REMARKS

UPON THE

TRYALS

OF

Edward Fitzharris, Stephen Colledge, *Count* Coningſmark, *The Lord* Ruſſel, *Collonel* Sidney, Henry Corniſh, *and* Charles Bateman.

As alſo on the

Earl of SHAFTSBURY's Grand Jury,

WILMORE's *Homine Replegiando*,

And the AWARD of EXECUTION againſt Sir *Thomas Armſtrong*.

By *John Hawles*, Barriſter of *Lincolns-Inn*.

Nec partis ſtudiis agimur, ſed ſumpſimus arma
Conſiliis inimica tuis, ignavia *fallax*! Selden of Tithes.

LONDON,

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THE

CONTENTS.

REMARKS

UPON SEVERAL

TRYALS.

THE ſtrange Revolution, which hath of late happened in our Nation, naturally leads one into the conſiderations of the Cauſe of it. The danger of ſubverting the Eſtabliſhed Religion, and invading Property, alone could not be the Cauſes. For if it be true, that the ſame Cauſes have generally the ſame Effect: It is plain, that, in the Reign of a precedent Monarch, the Subverſion of the Eſtabliſhed Religion was as much deſigned, or at leaſt it was believed to be ſo, as of late; and it is not material, whether what was ſuſpected was true, or not; and Property was as much Invaded, as of late, by impoſing Ship-money, and other Taxes on the Nation; but more eſpecially Ship-money: which at firſt was light and eaſie; but in progreſs of time, was encreaſed, according as it was found the Nation would bear it. And at length it was feared, as there was juſt reaſon ſo to do, that it would become as burthenſom, as what is now impos'd on the *French* Nation by the *French* King; and yet, when the War broke out, if the Hiſtory of thoſe Times, or the Perſons who lived a bout thoſe Times, are to be believed, the majority of the Nation took part with the King. There was therefore ſome other Reaſons for the Diſaffection of the Nation to the late Government, and they may be ranked under theſe ſix Heads.

Exorbitant Fines. Cruel and Illegal Proſecutions. Outragious Damages. Seiſing the Charters. Diſpenſing with the Teſt and Penal Laws. And Undue Proſecutions in Criminal, but more eſpecially in Capital Matters.

For the firſt I ſhall only obſerve, That when the Houſe of Commons in the Parliament 1680. took that matter into conſideration, and intended to impeach ſeveral Perſons for the ſame, the higheſt Fine at that time complained of, was but 1000 *l.* and yet

in few Years they were heightned to 10000 *l.* 20000 *l.* 30000 *l.* and 40000 *l.*

For the ſecond, The puniſhment of *Oates*, *Dangerfield*, and Mr. *Johnſon*; and the cloſe Impriſonment of Mr. *Hampden*, Sir *Samuel Bernardiſton*, and of ſeveral other Perſons, as it was againſt Law, ſo it was without Precedent.

For the Third, Tho' the Damages given to *Bolſworth* was the firſt Outragious Damages given, which were taken notice of, and in truth were ſuch, yet in little time Damages for matters of like kind were quickly improved to 10000 *l.* 20000 *l.* 40000 *l.* nay 100000 *l.* The truth of which a great many living Witneſſes to their Sorrow can teſtifie.

For the Fourth, The ſeiſing the City and other Charters, upon the pretences they were queſtioned, was without Example.

For the Fifth, The Diſpenſing with the Teſt and Penal Laws, was as miſchievous as it was Illegal; it making perſons capable, which were incapacited by Law, of being in Places, and of exerciſing Offices, for whom the perſons who had *Power* to Confer or Beſtow the ſame, had more affection, than for the perſons who at that preſent enjoyed them; the Conſequence of which was quickly ſeen, in turning out the preſent poſſeſſors, to make room for others; which was the thing which, as a *Scotch* Biſhop ſaid of another matter, ſet the Kiln a fire.

Of theſe five particulars ſomething hereafter may be ſaid, at preſent this Treatiſe is only to conſider, how far the Proceedings in Capital Matters, of late years, have been Regular or Irregular: And as to that, I ſhall not at all conſider, how far the perſons hereafter mention'd were Guilty of the Crimes of which they were accuſed, but how far the Evidence againſt them was Convincing, to prove them Guilty; and what Crimes the Facts proved againſt them in Law were.

REMARKS

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ON
Fitzharris's Tryal.

THE firſt Perſon I ſhall begin withal, ſhall be *Fitzharris*; and that it may not be wondred, that the Tryal and Condemnation of a Perſon who was confeſſedly an *Iriſh Papiſt*, ſhould be complained of; and one, whoſe Crimes were ſuch, that if the Law declared had not made Capital, it had been juſt in reſpect of the Malefactor, for the Legiſlative Power to have Enacted, that he ſhould ſuffer the ſevereſt Puniſhment uſually inflicted for the Higheſt Crime; yet in reſpect of the common good, it had been juſt and fit to have pardoned him, if he would have confeſſed who was his Conſpirators and ſetters on; for I am apt to think, that if that matter had been thorowly lookt into, ſome Perſons afterwards Witneſſes in the Lord *Ruſſel*'s, Collonel *Sydney*'s, and Mr. *Hampden*'s Tryals, had either never been produced, or have not been credited if produced; nor would my Lord of *Eſſex*'s Throat have been cut; and my Lord *Ruſſel* and Collonel *Sydney* might have worn their Heads on their Shoulders to this day.

All will agree, that there was a great ſtruggle between the Whigs and Tories, as they were then called, for hanging or ſaving that man: both agreed he deſerved to be hanged; the firſt thought it their advantage to ſave him, if he would confeſs; the laſt thought it was fit to hang him, for fear he would confeſs; and to explain the matter, it is fit to go a little higher: It cannot be but remembred, that before the breaking out of the Popiſh Plot, Mr. *Claypole* was impriſoned in the Tower for deſigning to kill the King, in ſuch place and manner as *Oates* afterwards diſcover'd the Papiſts intended to do it. In *Trinity* Term 1678. he had an *Habeas Corpus* to the *King's-Bench*, and was brought thither in order to be Bailed, and produced perſons of worth to bail him; but the penalty of the Bail ſet by the Court was ſo high, and the Court ſo aggravated the Crime for which he was committed, and the likelyhood of the Truth of it, that the Bail refuſed to ſtand, and *Claypole* was remanded to the Tower. But the Term after, when the matter of which he was accuſed, appeared bare faced, to be the Deſign of other people, he was let go, for fear the Examination of it ſhould go farther in proving the *Popiſh Plot*, than any thing at that time diſcovered. And if it were now

diſcovered

diſcovered, upon whoſe and what Evidence he was committed, it would go a great way in diſcovering the Truth of many Matters as yet in the dark; (but that Deſign miſcarried, becauſe the Intreague was diſcovered before it took effect, and yet a like deſign was ſtill carried on; and many of the Clergy of the Church of *England* had been prevailed with, to cry the *Popiſh* up as a *Fanatick* Plot.) The *Papiſts* and the Clergy of the Church of *England* being in the Late Times equally Sufferers, and oppreſt by the *Fanaticks*, they naturally grew to have a Kindneſs for each other, and both joined in hating the *Fanaticks*, and therefore pretended at leaſt that they did not believe any thing of the *Popiſh Plot*, but that that Report was given out by the *Fanaticks*, whilſt they themſelves were deſigning ſomething againſt the Church of *England*. The *Papiſts* having ſo great a party of the Clergy of the Church of *England*, ready to believe any thing of a *Fanatick Plot*, which they ſhould forge, and obſerving that that which gave Credit to the *Popiſh Plot*, was Writings concurring with Oral Teſtimony, which it did; for very little of the Truth of the *Popiſh Plot* depended on the Credit of *Oates*, *Bedloe*, or any other perſon, moſt of the Facts of that Deſign, when diſcovered, proving themſelves. To inſtance in one, *Oates* diſcovered *Coleman* had Intelligence with *Le Chaſe* of a Deſign on *England*, and that *Coleman* had papers teſtifying as much; when thoſe papers were ſeized, and owned by *Coleman*, and the purport of them was what *Oates* ſaid they were, it was not material, whether *Oates* was a man of Truth or not, the Papers, without *Oates* his further Evidence, ſufficiently proved the Deſign. I ſay the *Papiſts*, having obſerved what the Evidence was which gave Credit to that Plot, reſolved to purſue the ſame ſteps, and therefore *Dangerfield* was made uſe of to leave papers in Collonel *Manſel* his Lodging, who was an Acquaintance of my Lord *Shaftesbury's*, importing a Plot; but that was ſo fooliſhly carried on, and the then Attorney General, who had the Examination of that Matter, not being qualified with the Aſſurance his Succeſſor had, to carry on a thing that had neither Sence nor Honeſty in it, made ſuch a ſcurvy Report of the matter to the King and Council, that they were enforc'd to vote *Manſel* innocent, *Dangerfield* guilty, and that it was a Deſign of the *Papiſts* to lay a Plot to the Diſſenters charge, and a further proof of the *Popiſh Plot*. But that Attorney General being removed to a place of more Honour, tho' of leſs Profit, and another put in his place, the *Papiſts* reſolved to carry on the ſame Deſign, and no Perſon a fitter Inſtrument than *Fitzharris*, in reſpect of his Religion and his Acquaintance; but before his Deſign came to perfection, it was diſcovered.

He was firſt Impriſoned in *Newgate*, where ſome perſons (amongſt whom Mr. *Corniſh*, as I remember, then Sheriff, was believed to be one, and it was not the leaſt of his Crimes, that he endeavoured to look into that *arcanum*) went to examine him as to the particulars of that Deſign; which was quickly taken notice of, and the Priſoner in breach of the *Habeas Corpus* Act, removed from thence to the Tower, where he was kept cloſe Priſoner.

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The Parliament at *Oxford* meeting ſoon after *Fitzharris* his Apprehenſion, and the Houſe of Commons being informed of as much of his Deſign as was then diſcovered, they thought themſelves highly concerned to examine him; but how to do it they knew not; only they reſolved (upon a Report which one of their Members made them of one *Hubert*, who confeſſed himſelf guilty of Firing the City of *London*, upon which it was reſolved to examine him in the Houſe of Commons the next Morning, but before the Houſe ſate *Hubert* was hang'd) that *Fitzharris* ſhould not be hanged without their knowledge, and conſent; and to effect it, they remembred a deſign to try the five *Popiſh* Lords in the *Tower* upon Indictments, whereupon if they ſhould be acquitted, it was thought that thoſe acquittals might be pleadable to Impeachments; to prevent which, the Houſe had exhibited general Impeachments of High Treaſon againſt them in the Houſe of Lords; which had ſuch ſucceſs, that the Lords were never, and the Judges gave their Opinion, that they could not be tryed on the Indictments, as long as the Impeachments were in being; for which Reaſon, the Houſe of Commons exhibited a general Impeachment of High Treaſon in the Houſe of Lords againſt *Fitzharris*, which was received; after which the Houſe of Lords made an Order, that *Fitzharris* might or ſhould be tryed in the *King's-Bench* for the ſame Treaſon; ſuddenly after which, that Parliament was diſſolved. Whether *Fitzharris* his Buſineſs was the break-neck of that Parliament, I know not, but it was ſhrewdly ſuſpected it was.

There was at that time a Chief Juſtice in the *King's-Bench*, who was himſelf under an Impeachment of High Treaſon, and had not for that reaſon ſate in Court for ſome Terms preceeding, and the Tryal of *Fitzharris* being generally looked upon to be as illegal as it was odious, it was thought convenient to carry it on by a perſon of better Credit; whereupon one who had been a puiſny Judge of that Court, and had behaved himſelf very plauſibly, and had gained Credit by being turned out, was thought to be the fitteſt perſon to undertake it; and accordingly the then preſent Chief Juſtice was removed, and the other was preferred to his place.

It being reſolved that *Fitzharris* ſhould be tryed, the buſineſs was how to get Witneſſes to give Evidence to a Jury, and how to get Juries to find the Bill, and to Convict the Priſoner, which were difficult preliminaries.

A perſon who had been one of the Houſe of Commons which had exhibited the Impeachment, was a principal Witneſs, but if he ſhould give Evidence on the Indictment, he knew not how far he might be hereafter queſtionable and puniſhable for it, when a Parliament ſhould ſit again; but at laſt that perſon was prevailed upon to give Evidence, but by what means is beſt known to himſelf. And as for the Juries, Grand and Petty, they were ſatisfied with the direction of the Court, that they not only might, but ought to find the Bill, and Verdict according to their Evidence. And I think the Court was ſo far in the right.

That matter being adjuſted, a Bill of High Treaſon was found againſt the Priſoner, whereupon he was preſently arraigned, and after much conteſt and Declaration of the Court, that they could hear nothing till he had pleaded in chief, (which if he had done, the *Plea* he afterwards pleaded, which was to the Juriſdiction of the Court, had come too late) he had leave given him to plead the ſpecial matter of the Impeachment, and accordingly Counſel were aſſigned him to draw up and argue his *Plea* put in to the juriſdiction of the Court; which was, *That he was impeached in a Superior Court for the ſame Treaſon.*

Great endeavours were uſed to have the *Plea* over-ruled, without ſo much as hearing the Priſoner's Counſel for the maintaining it; the pretences were, That the Priſoner on his *Plea* ought to have produced the Record of his Impeachment, and that the *Plea* of the Impeachment for High Treaſon in general was nought, without ſpecifying what the High Treaſon was for which he was impeached: For an Impeachment, or an Indictment of High Treaſon in general, was nought; that the King had power to proceed on an Impeachment or Indictment for the ſame thing at his election. That the allegation, that *Fitz Harris* was impeached, which Impeachment ſtood in full force, not having mentioned an Impeachment before, was nought. But afterwards the Attorney General demurred, and the Priſoner joined in the Demurrer. And then day was given to argue the *Plea* till *Saturday* the 7th of *May*, at which time the Attorney added to the Exceptions he took to the Plea, Whether a Suit in a Superior Court can take away the Juriſdiction of another inferior Court, who had an Original Juriſdiction of the Cauſe, of the Perſon, and of the Fact, at the time of the Fact committed?

To maintain the Plea, the Counſel for the Priſoner alledged, That an Impeachment differed from an Indictment; the firſt was at the ſuit of the Commons of *England*, and was like an Appeal, or rather an Appeal aſſembled an Impeachment; that the proceedings were different in the Tryals; in the firſt, the Tryal is by the Houſe of Lords; in the laſt, of a Commoner, by a Jury of Commons: In the laſt, but little time was allowed for giving or conſidering of the Evidence; in the firſt a much longer time; that this matter was never practiſed before; that the King may pardon a Criminal proſecuted by an Indictment, but not by an Impeachment, no more than if proſecuted by an Appeal: If he ſhould be acquitted on the Indictment, it might be a queſtion whether that may be pleaded in Bar to the Impeachment; and if not, the Priſoner ſhould be brought twice in jeopardy of his life for the ſame Crime, contrary to the Rule of Law.

To the Objection, That the *Plea* was not certain, it being pleaded as an Impeachment of High Treaſon, not ſetting forth the High Treaſon in particular, it was anſwered, That an Impeachment differed from an Indictment; for by the Cuſtom of *Parliament*, which is the Law of the Land, ſuch a general Impeachment is good; but by the Law, a general Indictment of High Treaſon, without

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out ſpecifying what, when, where, or how, is not good; and therefore the *Plea* of an Indictment and an Impeachment variant.

As to the Objection, That there was no Impeachment mentioned before the averrment of *quæ quidem impetitio*, was frivolous, for it was before mentioned that he was impeached, and then by a neceſſary conſequence, there was an Impeachment.

As to the Objection, That the King might, in which Court he would, proſecute for High Treaſon, was little to the purpoſe; for the Caſe did not come up to it, the Impeachment being the Suit of the Commons, and not of the King; and that the Courts of *Weſtminſter-Hall* had refuſed to meddle with Matters relating to the *Parliament*. That tho' the Impeachment was general, yet it was made certain by the averment, that it was for the ſame Crime for which the Indictment was: That the Attorney General might have taken Iſſue, that there was no ſuch Impeachment as was pleaded; or elſe he might have ſaid, that the Impeachment was not for the ſame Treaſon, for which he was indicted; but having demurred, he had confeſſed both to be true; that at Common Law, if an Appeal of Murder had been brought, the King could not proceed on the Indictment, till the Appeal was determined; That the Judges, whereof ſome were then in Court, had given their Opinions to the King and Council, concerning the five Popiſh Lords, that they could not be tryed upon Indictments, ſo long as general Impeachments were depending for the ſame Treaſon, and yet their Caſes and this differed; there the Indictments were found before the Impeachments preferred, and here, after the Impeachment.

In the reply to vitiate the *Plea*, it was inſiſted, That it did not conclude *ſi curia procedere debeat* as well as *vult*, as was uſual for *Pleas* of that Nature to do; that perhaps this matter, if the Priſoner had been acquitted upon the Impeachment, might have been pleaded in Bar to the Indictment, but it was not pleadable to the juriſdicton of the Court; that in the Caſe of the five Lords, the Indictments were removed into the Houſe of Lords; that Appeals in Treaſon are taken away by the firſt of *Henry* the 4th; that in the *Plea* it ought to be averred, what *Lex & conſuetudo Parl.* are; that till Articles carried up, no man impeach'd is obliged to anſwer; that in all caſes of Appeals a man is put twice in jeopardy of his Life, if he be tryed upon an Indictment within a Year.

To take a ſhort review of what hath been recited, it was thought the King's Counſel run the Court upon a Rock, and it was hard for them to get off. The Court had adviſed them to take time to conſider what courſe they would take; but the Kings Counſel were haſty, as they always were when they were reſolved to carry a matter right or wrong; and having three bad ways they choſe the worſt.

If they had taken iſſue on the Record, or the Averment, that the Impeachment and Indictment were not for the ſame Treaſon, they might have pretended that the Journal of the Houſe of

Lords

Lords was not a Record, or that the Debates in the Houſe of Commons, were not good Evidence; or if they had replyed the Order of the Houſe of Lords, for Trying the Priſoner in the *King's-Bench*, to the Plea, they might have inſiſted on the power of the Houſe ſo to do; but having demurred, they confeſſed the Truth of all the matter of the Plea, and waved the Benefit of that Order, and ſtood upon Points of Law, either conceded by the Court, or reſolved by the Judges before; or ſuch neceſſary inferences from them as was impoſſible to be denyed.

It could not be denyed, but that a general Impeachment of High Treaſon by the Cuſtom of Parliament was good; it could not be denied, but, by the Reſolution of the Judges in caſe of the Lords in the Tower, a general Impeachment of High Treaſon ſtopt proceedings upon an Indictment for the ſame matter. It did not differ the caſe, that the Indictments in the *King's-Bench* againſt the Lords, were removed into the Houſe of Lords; for every one knows new Indictments might have been preferred againſt them for the ſame Crimes. And if that had been the Reaſon of the Judges Reſolution, why did not the Judges then in Court, all or moſt part of which were Judges at the giving that Opinion, deny the Opinion, or the Reaſon alledged? which they did not. It was not a Reaſon to diſallow the Plea, becauſe particular Articles uſe to follow general Impeachments, and the impeacht are not bound to anſwer, till the particular Articles were exhibited, which is true; for by the ſame Reaſon, a Defendant cannot plead an Action depending againſt him for the ſame matter in a ſuperiour Court, unleſs the Plaintiff hath declared againſt him in the Superior Court, which is not true. It was not a Reaſon that all Records in inferior Courts muſt be pleaded particularly, as Indictments, and the like; becauſe ſuch Records muſt be certain and particular, or elſe they are erroneous, and cannot be pleaded; but an Impeachment may be general.

Where the matter of a Plea is nought, no form can make it good; tho' where the matter of a Plea is good, an ill form may ſpoil it; if therefore a general Indictment or Record is nought, as in all the caſes cited againſt the Plea, it was no ſpecial averment to reduce it to a certainty; or any form can make it a good Plea: but a general Impeachment is good, and therefore it may and muſt be pleaded generally, and pleading it ſpecially, would make it falſe, if there were no ſubſequent Articles, as in this caſe there was not, to aſcertain it.

It is to no purpoſe, to run thorow all the ramble of the Counſel or Court againſt the Plea, when they all ſaid the matter of the Plea was not in queſtion, but the Form; and yet when ſo often asked in what of the Form it was defective? they were not able to anſwer. If it be agreed that the matter of a Plea is good, but it is defective in Form, they always ſhew how it ought or might have been mended, which in this caſe was never done: And as this caſe was new in ſeveral particulars, ſo it is in this, that in reading all the Arguments of this Plea, no man knows, by what was diſcourſed, what was the point in queſtion.

After

After the Arguments, the Chief Juſtice, in ſhew at leaſt, very favourably offers the Priſoners Counſel liberty to amend the Plea, if they could; which they apprehended, as they had Reaſon, (for I think none can ſhew how it might have been mended, rather a Catch than a Favour) refuſed to do; whereupon the Court took time to conſider of it, and on the 11*th* of *May*, there being a great Auditory, rather to hear how the Judges would bring themſelves off, than to know what the Law of the Plea was, the Chief Juſtice, without any Reaſons, delivered the Opinion of the Court, upon Conference had with other Judges, That his Brothers *Jones*, *Raymond*, and himſelf were of Opinion that the Plea was inſufficient, his Brother *Dolbin* not reſolved, but doubting concerning it, and therefore awarded the Priſoner ſhould plead to the Indictment, which he did; *Not Guilty*; and his Tryal ordered to be the next Term.

I think it would puzzle any perſon to ſhew, that if ever a Court of *Weſtminſter Hall* thought a matter of ſuch difficulty, as fit to be argued, that they gave their Judgments afterwards without the Reaſons: 'Tis true, that the Courts of Civil Law allow Debates amongſt the Judges to be private among themſelves, but the Proceedings at Common Law always were, and ought to be, in *aperta curia*. Had this practice taken place heretofore, as it hath of late (but all ſince this Preſident) no man could have known what the Law of *England* was, for the year Books and Reports are nothing but a Relation of what is ſaid by the Counſel and Judges in giving Judgment, and contain the Reaſons of the Judgment, which are rarely expreſt in the Record of the Judgment; and it is as much the duty of a Judge to give the Reaſons why he doubts, as it is of him who is ſatisfied in the Judgment. Men ſometimes will be aſhamed to offer thoſe Reaſons in publick, which they may pretend ſatisfies them, if concealed; beſides, we have a Maxim in Law undeniable, and of great uſe, That any perſon whatever may rectify or inform a Court or Judge publickly and privately, as *amicus curiæ*, a Friend to the Court, or a Friend to Juſtice: But can that be done, if the ſtanders by know not the Reaſon upon which the Court pronounce their Judgment? Had the three Judges, who were clear in their Opinion, given their Reaſons of that Opinion, perhaps ſome of the ſtanders by might have ſhewed Reaſons unthought of by them, to have made them ſtagger in, if not alter that Opinion; or if Juſtice *Dolbin* had given the Reaſon of his doubt, perhaps a ſtander by might have ſhewn him a Reaſon unthought of by him, which would have made him poſitive, that the Plea was, or was not, a good Plea.

If a man Swears what is true, not knowing it to be true, tho' it be logically a Truth as it is diſtinguiſhed, yet it is morally a lye; and if a Judge give Judgment according to Law, not knowing it to be ſo, as if he did not know the Reaſon of it at that time, but bethought himſelf of a reaſon for it afterwards, tho' the Judgment be legal, yet the pronouncing of it is unjuſt.

Judges ought to be bound up by the Reaſons given in publick, and not ſatisfie or make good their Judgment, by after thought of Reaſons. How very ill did it become the Chief Juſtice *Popham*, a perſon of learning and parts, in the attainting Sir *Walter Rawleigh*, of which Tryal all ſince that time have complained, when he gave his Opinion that the *Affidavit* of the Lord *Cobham*, taken in the abſence of Sir *Walter*, might be given in Evidence againſt him, without producing the Lord *Cobham* face to face to Sir *Walter*, (which was deſired by him, although the Lord *Cobham* was then forth-coming?) When he ſummed up the Evidence, he ſaid, *Juſt then it came into his mind, why the Accuſer ſhould not come face to face to the Priſoner, becauſe he might detract his Evidence, and when he ſhould ſee himſelf muſt dye, he would think it beſt that his Fellow ſhould live to commit the like Treaſon, and ſo in ſome ſort ſeek revenge.* Which beſides that it is againſt the Common Law and Reaſon, it is againſt the expreſs Statute of *E.* 6. which takes care that in Treaſon the Witneſs ſhall be brought face to face of the perſon accuſed.

Did it become a juſt man to give his Opinion, and bethink himſelf of a Reaſon afterwards? And I am miſtaken if it will not herein appear, that many perſons complained of, have been guilty of the ſame weakneſs, or injuſtice, call it which you will; ſo fooliſh are the beſt Lawyers and plauſible Speakers, when they reſolve to carry a point, whether juſt or not: However, they may deceive the Ignorant, yet they talk and argue very abſurdly, to the apprehenſion of the majority of mankind. And they had been ſooner diſcovered, but that the diſcoverers were quickly ſuppreſt, and cruſhed, as Scandaliſers of the Juſtice of the Nation. And I think this may be juſtly called the firſt mute Judgment given in *Weſtminſter-Hall.*

But to return to *Fitzharris* his Tryal, which came on the 9th of *June*; and then the King's Counſel made uſe of their Arts in managing the Jury. And firſt, there was a great many perſons for Jurors, to which Mr. Attorney had no Stomach, ſome challenged for Cauſe, for that they were no Free-holders, as *John Kent*, *Giles Shute*, *Nathaniel Grantham*, and ſeveral others, and the Challenge allowed to be a good Challenge by all the Court; for tho' the Chief Juſtice ſpoke only, yet all the Court aſſent to what one Judge ſays, if they do not ſhew their diſſent. I do not take notice of this, as complaining of it, for I think it is good Cauſe of Challenge in Treaſon; but then I cannot but wonder at the Aſſurance of the ſame King's Counſel, who denied it to be a good Cauſe of Challenge in the Lord *Ruſſel's* Tryal. It is true, that was a Tryal in the City; but that matter had no conſideration in the Judgment; for after the Lord *Ruſſel's* Counſel had been heard, all the Judges delivered their Opinions, That at Common Law, *No Freehold* was no Challenge in Treaſon; and that the *1ſt.* and *2d. Philip* and *Mary* had reſtored the Tryal in Treaſon to be what it was at Common Law; of which number of Judges, Sir *Francis Pemberton* and Sir *Thomas Jones* were two, nay Sir *Francis Pemberton*

ton asked Mr. *Pollexfen*, *Whether he found any Reſolution at Common Law, that* no Freehold *was a Challenge in Treaſon?* And that Judgment is afterwards cited in Collonel *Sidneys* Tryal *fol.* 63. as the Opinion of all the Judges of *England*, That *no Freehold* was no Challenge to a Juror in Treaſon at Common Law; and *Col. Sydney's* Tryal was in a County at large.

But if it was not a Challenge at Common Law, I would know how it came to be a Challenge in *Fitzharris* his Caſe? There was no intervening Act of Parliment to alter the Law between the two Tryals, that I know of.

Another art uſed, was to Challenge for the King, without Cauſe, where no Cauſe could be ſhewn, ſuch Jurors as they did not like.

The Priſoner was troubled at this, and appeals to the Court, whether the Attorney General was not obliged to ſhew his Cauſe of Challenge; but is anſwered by the Court, that he need not, till all the Pannel was gone through, or the reſt of the Jurors challenged, which is true; but had the Priſoner been adviſed to challenge the reſt of the Jury, as he would have been, if he had had Counſel, the Attorney muſt have waved his Challenge, or put off the Tryal. And ſince he was not allowed Counſel, why ſhould not the Court, according to their Duty, as they have ſaid it is, have adviſed him ſo to do? I am ſure in Count *Coningsmark's* Tryal, when Sir *Francis Winington* challenged a Juror without Cauſe for the King, the Court preſently asked the Cauſe; and ſuch Anſwers was made by the Proſecutor's Counſel as was made to *Fitzharris*; whereupon the Court told the Count that the way to make them ſhew their Cauſe of Challenge, was to challenge all the reſt of the Jury; and thereupon the Challenge was waved. They were different Practices, tending to different Ends, and accordingly it ſucceeded, *Fitzharris* was Convicted, and the Count Acquitted.

Upon the Tryal the Evidence was this, *Fitzharris* was the 21*ſt.* day of *February*, 1681. with *Everard*, gave him Heads by word of mouth, to write the Pamphlet in the Indictment mentioned, to ſcandalize the King, raiſe Rebellion, alienate the Hearts of the People, and ſet them together by the Ears; the Libel was to be preſented to the *French* Ambaſſador's Confeſſor, and he was to preſent it to the *French* Embaſſador, and it was to ſet theſe people together by the Ears, and keep them claſhing and miſtruſting one another, whilſt the *French* ſhould gain *Flanders*, and then they would make no bones of *England*: For which Libel, *Everard* was to have 40 Guineys, and a monthly Penſion, which ſhould be ſome 1000 of pounds; *Everard* was to be brought into the Cabal where ſeveral Proteſtants and *Parliament* men came to give an account to the Embaſſador, how things were tranſacted. *Everard* asked what would be the uſe of the *Libels*? *Fitzharris* ſaid, we ſhall diſperſe them we know how; they were to be drawn in the Name of the Nonconformiſts, and to be put and fathered upon them: This was the ſum of *Everard's* Evidence.

Mr.

Mr. *Smith* proved *Fitzharris* his giving inſtructions to *Everard*; and Sir *William Waller*, and others, proved the Libel, and the Diſcourſe about gaining *Flanders*, and *England*: other Witneſſes were examined to prove *Fitzharris*'s hand, for the Priſoner. Dr. *Oates* ſaid, *Everard* told him the Libel was to be printed, and to be ſent about by the Penny-Poſt, to the *Proteſting* Lords, and Leading Men of the Houſe of Commons, who were to be taken up as ſoon as they had it, and ſearched, and to have it found about them. He ſaid the Court had an hand in it, and the King had given *Fitzharris* Money for it already, and would give him more if it had ſucceſs.

Mr. *Corniſh* ſaid, when he came from *Newgate* to the King, to give him an account in what diſpoſition he found the Priſoner to make a diſcovery, the King ſaid he had had him often before him and his Secretaries, and could make nothing of what he did diſcover; that he had for near three Months acquainted the King he was in purſuit of a Plot, of a matter that related much to his Perſon and Government, and that in as much as he made proteſtations of Zeal for his Service, he did countenance and give him ſome Mony; that the King ſaid he came to him three Months before he appeared at the Council Table.

Collonel *Manſel* ſaid that Sir *William Waller* gave him an account of the buſineſs in the preſence of Mr. *Hunt*, and ſeveral others, and ſaid, that when he had acquainted the King with it, the King ſaid he had done him the greateſt piece of ſervice that ever he had done him in his life, and gave him a great many thanks: But he was no ſooner gone, but two Gentlemen told him, the King ſaid he had broken all his Meaſures, and the King would have him taken off one way or another, and ſaid that the Deſign was againſt the *Proteſtant Lords*, and *Proteſtant Party*. Mr. *Hunt* confirmed the ſame thing, and added, that he ſaid the deſign was to contrive thoſe Papers into the hands of the people, and make them Evidences of Rebellion, and appealed to Sir *William Waller* who was preſent, whether what he ſaid was not true. Mr. *Bethel* ſaid *Everard* before he had ſeen *Bethell*, or heard him ſpeak a word, put in an Information of Treaſon againſt him, at the inſtigation of *Bethel*'s mortal Enemy; which Information was ſo groundleſs, that tho' it was three years before, yet he never heard a word of it till the *Friday* before.

Mrs. *Wall* ſaid, *Fitzharris* had 250 *l.* 200 *l.* or 150 *l.* for bringing the Lord *Howard* of *Eſcrick*; ſhe added, that *Fitzharris* was looked upon to be a *Roman Catholick*, and upon that account it was ſaid to be dangerous to let him go near the King, that he never was admitted to the King.

The Lord *Cornway* ſaid, that the King had declared in Council, that *Fitzharris* had been employed by him in ſome trifling buſineſſes, and that he had got money of him; but added, as of his own Knowledge, that the King never ſpoke with him till after he was taken, which was the 28*th* of *February* laſt.

All

All the Evidence being over, it was ſummed up by the Counſel, That upon all the Circumſtances of it, *Fitzharris* was the Contriver and Director of the Libel; that it was a Treaſonable Libel, and a Jeſuitical Deſign; that the Excuſe he made as if *Everard* drew him into it, or trepanned him into it, was vain; nothing of that being proved. That *Everard* could do nothing alone, and therefore Sir *William Waller* muſt be in the contrivance; but that was unlikely: that the Priſoner would inſinuate that the King hired him to do it, becauſe the King gave him Money, but that was out of Charity; and therefore concluded, with a great many words, that an *Engliſh Proteſtant* Jury of twelve ſubſtantial men, could not but find the Priſoner guilty.

The Court added, that tho' Doctor *Oates* ſaid, *Everard* ſaid it was a deſign of the Court, and was to be put on ſome Lords, and into ſome Parliments Men's Pockets, yet *Everard* was there upon Oath, and teſtified no ſuch thing in the world; and for the Impeachment in the Lords Houſe they were not to take notice of it.

After which, the Jury informed the Court, that they heard there was a Vote in the Houſe of Commons, that the Priſoner ſhould not be tryed in any inferiour Court: To which the Chief Juſtice ſaid, That that Vote could not alter the Law, and that the Judges of that Court had Conference with all the other Judges concerning that matter, and it was the Opinion of all the Judges of *England*, that that Court had a Juriſdiction to try that man. After which, Juſtice *Jones* was of Opinion, that if he were acquitted on that Indictment, it might be pleaded in Bar to the Impeachment. And Juſtice *Raymond* delivered his Opinion to the ſame purpoſe: It is ſtrange, that all the Judges ſhould be of that Opinion, yet before it was ſaid, Juſtice *Dolbin* doubted. It is more ſtrange, that if Juſtice *Dolbin* was not of that Opinion, he would hear it ſaid he was, and not contradict it. It is moſt ſtrange, that if the Judges of that Court were of that Opinion, they had not declared ſo, in the arguing or giving Judgment on the Plea; for that was the Matter of it, being pleaded to the Juriſdiction of the Court, that they had not power to try the Priſoner for that Crime, ſo circumſtanced.

If the Plea had been over-ruled as to the Matter, none would have been ſo impertinent, as to go about to maintain the Form of it.

Now to ſay truth in behalf of the publick, and not on behalf of *Fitzharris*, the Evidence was unfairly ſummed up; for *Fitzharris* never pretended *Everard* drew him in, or was to trepan him: It is true, he asked *Everard* what the deſign of the Pamphlet was, and whether he was not put upon it to trepan others? who anſwered, he was not. But afterwards being too nearly preſt by the Attorney General, he ſaid, *Fitzharris* told him the uſe of the Libels was to diſperſe them he knew how; that they were to be drawn in the name of the Non-conformiſts, and put upon them. And *Oates* ſaid, *Everard* ſaid the Libels were to be printed, and ſent abroad by

the Penny-Poſt to the Proteſting Lords, and Leading Men of the Houſe of Commons, and the perſons ſeiſed with them in their pockets; which is all ſtrong Evidence that the Libel was deſigned to trepan others, and that was all along the import of *Fitzharris* his Queſtions, though cunningly not anſwered by ſome of the Witneſſes, and as cunningly omitted in ſumming up the Evidence.

It is true, the Chief Juſtice ſaid, *Everard* ſaid no ſuch thing as *Oates* had ſaid; but why was not *Everard*, who was then preſent, asked whether he ſaid what *Oates* had given in Evidence?

There cannot be ſhewn any Preſident where a Witneſs contradicts, or ſays more or leſs than a Witneſs that went before him, by the hearſay of that Witneſs; but the firſt Witneſs is asked, what he ſays to it? Why was not Sir *William Waller*, who was alſo preſent, asked what he ſaid to the Evidence of Mr. *Manſell* and Mr. *Hunt*? and who it was that informed Sir *William* what the King ſaid? It was no way in proof, nor pretended by *Fitzharris*, that any perſon was concerned in that matter, but *Everard* and *Fitzharris*, though it was ſhrewdly ſuſpected by the Houſe of Commons; and no man that reads the Tryal, but believes there were many more concerned, not yet diſcovered; but the Counſel might have brought in any Judge of the Court by the head and ſhoulders to be a Confederate, as well as Sir *William Waller*, that was a *Jack-a-lent* of their own ſetting up, in order to knock him down again.

It was not pretended by *Fitzharris* that the King gave him any money to frame that, or any other Libel; there was Evidence, that he had got money of the King for ſome little matters he was imployed in; perhaps for bringing Libels diſperſed abroad, or diſcovering Plots.

Upon the whole Evidence, it was plain that *Fitzharris* was an *Iriſh* Papiſt; it was plain he was the only viſible Contriver of the Libel; who were behind the Curtain, is not plain, and to know them, was the Deſign of the Impeachment.

It was plain it was a Deviliſh Jeſuitical Deſign, as the Court and Counſel, in ſumming up the Evidence, agreed it to be; it was plain, that the Libel was ſuch, that if diſperſt with intention to ſtir up the King's Subjects againſt him, it had been High Treaſon within the Statute of the 13*th* of the King; but what the intention of the contriving the Libel was, was not very certain; and therefore, conſequently what the Crime of it was, was uncertain.

To take the Evidence all the ways, as to the Deſign of the contriving of the Libel, it is capable of being interpreted, the eaſieſt conſtruction, is to ſay, he framed a Libel with intention to pretend to the King, that he had intercepted a Libel privately diſperſed; and to make it more likely, it ſhould be framed in the Nonconformiſts Names, to make his Report the more credible, (for of Papiſts or Churchmen it could not be believed) to get more money of the King; and that matter, by all his Queſtions to the Witneſſes, he moſt drove at; and that would at moſt be but a Cheat.

A more Criminal, but leſs credible conſtruction, is to believe he deſigned to diſperſe them, to excite and prevail upon the Diſcontented to take up Arms.

For what Effect had that Pamphlet, when it was, for it was afterwards diſperſed, upon the Minds of the People? or what Effect could any Man of Senſe think it could have? for though it was a Virulent, yet it was as Fooliſh a contriv'd Libel as ever was writ; yet I own if it had been writ and diſperſed with that Deſign, it had been High Treaſon within the Statute of *E.* 2.

But the moſt natural Conſtruction of the worſt Deſign of it, was to trepan the Parliament-men, and make the Libels Evidences of a Rebellious Conſpiracy, this *Everard* confeſſes *Fitzharris* told him was the uſe to be made of them; and *Everard* could not know the Deſign of them, but by what *Fitzharris* told him. And *Oates* well explains what *Everard* meant by the words, in his Evidence, *put the Libel on the Nonconformiſts*, by what *Everard* told him.

But yet even that, though in it ſelf the higheſt Crime a Man can be guilty of, next to putting it in Execution, is but a Conſpiracy, which was mildly puniſhed in *Lane* and *Knox* their Caſe, though this exceeded that; that being a deſign only againſt one Perſon, this againſt many.

Yet tho' this was of no higher Crime by the Law as now eſtabliſhed than a Miſdemeanor, it was fit for the Legiſlative Power to have puniſhed it in manner it was puniſhed, which yet the Legiſlative Power ought to reſent as an Injury, for an inferior Court's ſnatching the Exerciſe of that Power out of their hands, which only belongs to the Supream Authority.

That this Crime, upon conſtruction of the Evidence taken in the beſt Senſe, is no Treaſon, though the Libel ſhould in all probability incite the Subject to leavy War, which it was not likely to do, or in Fact it had been the cauſe of a Rebellion, yet if it was not deſigned by the Contriver to that purpoſe, it was not Treaſon by the Statute of *Edward* the Third, or *Charles* the Second; for in the laſt Statute it is Deſigning to levy War, and in the Statute of *Edward* the 3*d.* it is a ſtrained Conſtruction, to make deſigning to leavy War Treaſon, yet none ever pretended to ſtrain the Senſe of that Statute farther than deſigning to do it.

If the Ill Effects the Libel did, or might produce, made it Treaſon, then Sir *Samuel Aſtrey*, who read it in Court at the Tryal, and the Printer that afterwards printed and publiſhed it, and Sir *William Waller*, who read it to Mr. *Hunt* and others, were guilty of Treaſon; for the Libel carried no Venom or Charm with it the more, for being framed by *Fitzharris*, or *Everard*, or for being publiſhed by either of them, than if publiſhed by another perſon.

The difference is, *Aſtrey* read it aloud, as his Duty; the Printer printed and publiſhed it for gain; Sir *William Waller* publiſhed it as a Novelty; and if *Fitzharris* contrived it to put it upon the Nonconformiſts or Parliament Men, and not ſtir up a Rebellion, tho' it tended to all the ill conſequences mentioned in his Indictment, yet it was not Treaſon.

But

But it will be urged, how ſhall *Fitzharris* his intention be proved? it was a queſtion which made a mighty ſputter in arguing the Plea, how ſhall it be proved, that the Impeachment was for the ſame Treaſon for which the Indictment was? but in the Tryal of *Fitzharris*, that queſtion was fully cleared; for it was proved there, that the very Libel then produced in Court, was the ſame Libel read in the Houſe of Commons, upon which the Impeachment was Voted.

And to ſay Truth, nothing can be put in Iſſue, but is capable of Tryal. *Quo animo* a thing is done in all overt Acts of a deſign, is one of the main queſtions; or to ſpeak in Law Phraſe, whether done *proditorie* or not, an Adverb of great uſe and ſenſe, tho' heretofore ſlighted; and under which, I believe a great many perſons will be enforc'd to ſhelter themſelves from being puniſhed by the Law Eſtabliſhed.

No Man will pretend, that Libel did any man Miſchief, but the Contriver, nor in probability could have done, if not uſed to the purpoſe *Everard* ſaid to *Oates*. Yet other perſons have been guilty of as illegal Acts, of worſe conſequences in proſpect, and much worſe in effect, and it did not amount to Treaſon. I dare ſay, the Allegation, that they diſturbed the Kingdom by their Acts and War cauſed to be moved againſt the King, is true of them, and they are guilty of all the aggravations uſed in Indictments of Treaſon.

To inſtance in ſome of many, Did it not make a mighty heart-burning in the City againſt the Government, and raiſed great Jealouſies between the King and People, when the Sheriffs *North* and *Rich* were impoſed on the City? Did not the taking away the Cities right of Electing Sheriffs, and the ſuſpicions for what end it was done, beſides the Illegalities that followed? If Sir *Edward Herbert* in his late Vindication, *fol.* 16. be Law, as it hath an Aſpect as if it were, that Grand Juries returned by ſuch as are Sheriffs in fact, but not in right, are illegal, and Convictions on their preſentments are illegal and void, give great diſturbance, and that Opinion ſeems to be countenanced by my Lord *Coke's* 3*d. Inſtit. fol.* 32. in his Comment on the 11*th* of *Henry* the 4*th*, and conſequently the Lord *Ruſſel's* and other Attainders void? Did it not add to the heart-burning, the puniſhing thoſe Citizens as Rioters, who were at *Guildhall* innocently conteſting their right of Electing? Was it not an increaſe of the miſchief, the bringing the *Quo Warranto* againſt the City, whereby the Credit of the City was loſt, and many Orphans ſtarved, and more impoveriſhed, beyond the poſſibility of recovery? And it was yet heightned by the Judgment given in the higheſt Caſe that ever came into *Weſtminſter-Hall*, by two Judges only, and that without one word of Reaſon given at the pronouncing, according to the pattern of *Fitzharris* his caſe, and was the ſecond mute Judgment? Did it not fright all honeſt men from being on criminal Juries, when *Willmore* was ſo illegally proſecuted for not giving a Verdict againſt his Conſcience, by an *homine replegiando* and Information? And did not that make all Merchants, who had Tranſ-

actions

actions beyond Sea, afraid to ſend their Servants thither, for fear they might be laid by the heels till they fetched them back again? Did it not ſtartle the Lords and the Leading Men of the Houſe of Commons mentioned ſo often in *Fitzharris* his Tryal, when the Earl of *Eſſex*, Lord *Ruſſel*, Collonel *Sidney*, Mr. *Hampden*, and ſeveral others were clapt up cloſe Priſoners in the Tower? Did it not deter any honeſt man from appearing to witneſs the truth, when Sir *Patience Ward* was convicted of Perjury? Did it not provoke two great and noble Families, when the Lord *Ruſſel* and Collonel *Sidney* were ſo illegally and unhandſomely dealt withal, as ſhall be hereafter declared? Did it not provoke all the Nation, except the Clergy and Soldiery, when all the Charters of *England* were ſeized, and not regranted, but at exceſſive rates, to the ſtarving the poor, who ſhould have been fed with the Money which went to purchaſe the new Charters, and reſerving the diſpoſition of all the places of profit and power, within the new Corporations, to the King, but which indeed the Confederates ſhared amongſt themſelves? Nay the very Election of Burgeſſes, the freeneſs of which is the great fundamental of the Government, was monopoliz'd, and put into a few hands. Did not the unreaſonable Fines, and cruel Puniſhments inflicted, oppreſs many, terrifie all, and conſequently make the Government odious to the Subject? Did not the Cruelties acted in the *Weſt*, enrage above a third part of the Nation? Did not the turning out many of the Soldiery and Clergy, without any reaſon; and for that purpoſe Erecting Arbitrary Courts, and granting Diſpenſations to perſons by Law diſabled, to enable them to have and enjoy the Places and Offices of ſuch as were illegally turned out, and of all who ſhould be in like manner turned out? And was it not ſeen what the Conſequences of thoſe things would be, by all who did not wink their Eyes, or who were not blinded by the Profit they made of ſuch illegal and cruel Acts? Was not the King at laſt ſenſible, that the Conſequence of what before recited would be what afterwards happened? And did he not in leſs than a Months time, when too late, throw down all that *Babel* of Confuſion which had been ſo long a building, and did all in his power, and would have done more if he could, to have ſet things as right as they were before the Parliament of *Oxon*; for from thence the Extravagancies may be dated: But Alas! more miſchief can be and was done by weak Brains, than the beſt Wits can retrieve; thoſe that were dead could not be brought to life; the Reſtitution of the Cities Charters was but in ſhew a relief; how ſhall thoſe defend themſelves, who have acted under all the illegal Sheriffs, conſtituted and not Elected? How ſhall thoſe defend themſelves, who have acted under Officers appointed by the new Charters, which by the Reſtitution are gone as if they never had been? How ſhall Sheriffs, Goalers, and other Officers, who have had, or now have Cuſtody of Priſoners, and having not taken the Teſt, truſting to the validity of a Diſpence, behave themſelves? Shall they continue to keep their Priſoners in Cuſtody, or let them go? If the laſt, they are Subject to Actions of Eſcape; if the firſt, they are liable to falſe Impriſonment. Theſe

and a many more Miſchiefs, not yet ſeen, are the natural reſults of theſe Illegal Actions.

I never reflect on theſe things, but I remember *Tully* in his Offices lays down as a Rule, That nothing is Profitable, but what is Honeſt, and gives many Reaſons for it; but nothing ſo convincing, as the Examples he brings in Publick and Private matters; and tho' the Empire was vaſt, and he bore a great Figure in it, and was very knowing, and was well read in the Greek and Roman Hiſtories, yet he was not able to bring a 100*th* part of Examples, to prove his Poſition, as have been in this little Iſland in the ſpace of eight years. And the Perſons, by whoſe advice theſe things were tranſacted, are the more inexcuſable, if it be true what a certain Nobleman, (who bore a conſiderable Character in the two late Kings Council,) once ſaid to me was true. He was complaining that the King was miſ-led by the Advice of his Lawyers. I asked him whether the King put his Judges and Counſel upon doing what was done, without conſidering whether it was Legal; as the common Vogue was, he did; or that his Lawyers firſt adviſed what to be done, was Law? He anſwered me, on his Honour, the King's Counſel at Law, firſt adviſed the King might do by Law what he would have done, before he commanded them to do it.

Yet I agree, none of thoſe matters, tho' ſo inconvenient and grievous, are Treaſon by the Statutes of *E.* 3. or *C.* 2.

For Profit in ſome caſes, Revenge in others, the endeavouring means to eſcape Puniſhment, and a natural propenſity to Cruelty in many, were the true ends were driven at, and not the bringing their Prince into the Hatred of his Subjects, tho' that was a neceſſary conſequent of all recited, and of many more matters omitted: And let *Fitzharris* his Crime, and thoſe recited, be but Examined, and his was but a *Piccadillo* to the leaſt of thoſe; tho' this was acted by an *Iriſh Papiſt*, and thoſe by *Engliſh Proteſtants*, Sons of the Church of *England* as by Law Eſtabliſhed, as they call themſelves; tho' I doubt, not ſincere Proteſtants, as my Lord *Ruſſel* ſaid; words which were matter of Laughter to thoſe who brought him to the Block.

But, tho' neither *Fitzharris* his Crime, taken in the laſt Senſe, nor the above Crimes were High Treaſon by any Statute; and the Judges have not Power to puniſh any other Treaſons; yet in all times the Parliaments have practiſed, and it is neceſſarily incident to all Supream Powers, in all Governments, to Enact or Declare extravagant Crimes to be greater than by the Eſtabliſhed Law they are declared to be, not by vertue of the Clauſe in the Statute of *Edward* the 3*d*. whereby ſome have, by miſtake, thought that a Power was reſerved to the *Parliament* to declare other matters Treaſon, than what is therein expreſt; for admit that Clauſe had been omitted, there is none can doubt, but in point of Power, the *Parliament* could (how far in juſtice they might, is another Queſtion) have declared any other matter to be Treaſon, and the words of that Clauſe are very improper expreſſions, either to veſt or reſerve a Power in the *Parliament*, for the words are only pro-

prohibitory to the Judges, to adjudge any other Matters Treaſon, than thoſe expreſt in the Act, tho' they were ſomewhat like thoſe expreſs'd, and therefore might be ſuppoſed Treaſons; and it is a ſort of monition to Offenders, that they ſhould not preſume to be guilty of Enormous Crimes, upon preſumption that they were not Treaſons within that Act. For in the preamble, 'tis ſaid, becauſe many other like Caſes of Treaſon (which in Sence are Caſes like Treaſon declared in that Act) may happen in time to come, which could not be thought of or declared at that preſent; therefore if any ſuch ſhould happen before any Juſtice, the Juſtice ſhould tarry, and not proceed to give Judgment of Treaſon on it, till it ſhould be judged in Parliament, Treaſon or Felony. How well the Judges in late days have obſerved this prohibitory Law, let the world Judge; and moſt certainly the Parliament might have declared in *Fitzharris* his Caſe, as they may in thoſe other, that the Crimes were Treaſon, Felony, Miſpriſion of Treaſon, Treſpaſs, or what other Crime known in the Law, and inflict what Puniſhment they thought fit; and it is no injuſtice for the Supream Power to puniſh a Fact in a higher manner than by Law Eſtabliſh'd, if the Fact in its nature is a Crime, and the Circumſtances make it much more heynous than ordinarily ſuch Crimes are. It was not injuſtice in the Parliament of the ſecond and third of *Philip* and *Mary* to Enact, that *Smith* and others, who were ſuppoſed to be guilty as Acceſſaries to a barbarous Murder, and were equally if not more guilty than the Principal, to Enact, as they did, that if they ſhould be found guilty as Acceſſaries, they ſhould not have their Clergies, which at the time of committing the Fact Acceſſaries to Murder were allowed to have. It is true, to Declare or Enact a Fact, after it is committed, to be a Crime, which when committed was in it ſelf none, ſuch as tranſporting Wool beyond Sea, and the like, would be high Injuſtice.

REMARKS

REMARKS

UPON

Colledge's Tryal.

BUT to return whence I have digreſt, *Fitzharris* being Executed according to his Sentence, tho' there was great grumbling amongſt the Proteſtants, that thoſe who ſet him on work were concealed, and never like to be diſcovered now he was dead; yet all was quiet, but the Conſpirators, who reſolved, tho' *Fitzharris* miſcarried in his Deſign, yet the *Plot* ſhould go on, but what it ſhould be, or where the Scene of it ſhould be laid, or who the *Plotters* ſhould be, they were not well reſolved.

Great noiſe of Warrants being iſſued out there was, but at laſt, all centered in an inconſiderable Fellow, one *Stephen Colledge*, a *Joiner* by Trade, who for his Honour, as a Priſoner of State, was committed to the *Tower* for High Treaſon. At firſt it was deſigned to lay the Scene in *London*, and accordingly a Bill of Indictment of High Treaſon was exhibited to the Grand Jury (whereof *Wilmore* was one) at the Seſſions Houſe; but the Buſineſs of *Fitzharris* was ſo new, and ſmelt ſo rank, that the Bill could not be diſgeſted, but was ſpewed out with an *Ignoramus*; for which *Wilmore* was afterwards forced to fly his Country.

Then it was reſolved the Scene ſhould be at *Oxford*, and accordingly the King's Counſel, with *Iriſh* Witneſſes, at the Aſſizes, poſt thither, and prevail with the Grand Jury, to find the Bill; but by what Arts is not known, for he was privately ſhut up with them; and I ſhould wonder, if he, who frequently in the hearing of thoſe who underſtood better than himſelf, had aſſurance enough to impoſe upon the Courts, ſhould ſcruple in private to impoſe any thing on an ignorant Jury.

I know not how long the *Practice* of that matter of admitting Counſel to a Grand Jury hath been; I am ſure it is a very unjuſtifiable and unſufferable one. If the Grand Jury have a doubt in point of Law, they ought to have recourſe to the Court, and that

that publickly and not privately, and not rely upon the private opinion of Councel, eſpecially of the Kings Councel, who are, or at leaſt behave themſelves as if they were Parties.

It is true, it is ſaid that they are upon their Oathes, and though it be not expreſt in their Oathes, that they ſhould do Right between the King and Subjects, yet that is implied in the Oath I agree; but have they behaved themſelves as if they were under an Oath? beſides all Men are not capable of giving advice to be relied on in ſo great a matter as Life; but the manner of doing it being in private, can never be juſtified. I know in *Fitz-Harris* his Caſe, the Kings Councel were cajoling the Grand Jury in private for ſome hours, but I did not think fit to take notice of it in that Trial, becauſe I think both the Grand and Petty Jury did very well, they acted according to the beſt of their underſtanding, which is all that God or Man required of them; they asked pertinent Queſtions, they were over-ruled in ſome, not fully anſwered in others; not that I think either of them gave a Verdict according to Law upon the Fact, as it appeared upon the Evidence; but that was not the fault of the Jury, but of the King's Councel, and of the Court who miſlead the Jury. I thought it more proper to take notice of it in this Trial, wherein the firſt Bill was rejected by an underſtanding Jury; and all Men wondred how the ſecond came to be found *Bills Vera*; and for that reaſon one of the King's Councel boaſted at Court of his ſervice and cunning management in the matter.

The Bill being found, the next matter was to bring the Priſoner to his Trial, and as he had more honour than what uſually is beſtowed on ſo mean a Man, to be Committed to the Tower, though in truth it was to keep him from all means of defence; ſo to carry the matter on, he was allowed to have by Order of the King and Council, a Councel and Sollicitor to come to him, and adviſe him for his Defence at all events; a favour denied to *Fitz-Harris*, for his Councel was to adviſe to the matter of the Plea only; but that favour in ſhew was only to betray him, as ſhall be ſhewn: And a third favour he had, which no Man of his quality ever had; there were then three of the King's Councel ſent from *London*, and all the Councel could be pick'd up upon the ſpot, which were three more, and no leſs than four Judges to Proſecute and Try him; but that was to make ſure work of him.

The *17th.* of *Auguſt*, 1681. he came to his Trial, his Endictment, as to part, was in common form for Treaſon, but particularly for deſigning to ſeize the King's Perſon at *Oxford*, mixt with words, he ſhould ſay, as, That there was no good to be expected from the King, he minded nothing but beaſtlineſs, and that he endeavoured to eſtabliſh Arbitrary Power and Popery; to which being required to plead, he de-

ſired a Copy of the Indictment, a Copy of the Jury, to know upon what Statute he was Indicted, and Councel to adviſe him whether he had any thing pleadable in Bar, all which were denied him; then he deſired he might have his Papers which were taken from him after he was brought from the Priſon, and before he came into Court, at an Houſe over againſt the Court; for ſo it ſeems the King's Councel had ordered the matter, that the Goaler *Murrel*, and the Meſſenger *Sawel*, after they had him out of the Priſon, ſhould run him into an Houſe, and take away all his Papers, which they believed were the inſtructions, as in truth they were, of the Councel aſſigned him when in the Tower, and bring the Papers to them, whereby they would not only diſable him of his Defence, but they could be better inſtructed how to proceed in a way for which he had not provided himſelf of any Defence.

Murrel and *Sawel* did as the King's Councel directed them; much wrangle there was whether he ſhould have his Papers or not, all the Court agreed he ſhould not have them till he had pleaded *Guilty* or not *Guilty*, and afterwards he ſhould have the uſe of ſome, and not of others, becauſe they did not appear to be written by himſelf, but by ſome Councel or Sollicitor, and as they ſaid, none is allowed in Treaſon, unleſs aſſigned by the Court; the Chief Juſtice *North* ſaid they were not taken away by him; but ſays *Colledge*, They were taken away by the Keeper under pretence of bringing them to his Lordſhip; the Court ſaid they knew not what Papers he meant, and knew nothing of it; he ſaid the Indictment mentioned ſomething of Miſdemeanor as well as Treaſon, but he knew not how to make his Exceptions without his Papers. I have thought fit to mention all theſe things, becauſe this Trial was the inlet to all that followed, and gave encouragement to ſpill nobler Blood; the injuſtice of the violence uſed to the Priſoner, muſt be meaſured from the Reaſons given for it, That the Papers were inſtructions from Councel and Sollicitors, and none in Law was allowed in Treaſon. 'Tis true, no Counſel are allowed for the Priſoner in a Trial upon an Indictment of any capital matter, but in an appeal for capital matters, Councel are allowed even on the Tryal. The reaſon given that the Indictment is the Suit of the King, and no Councel or Witneſs is allowable in a capital matter againſt the King, is fooliſh, as ſhall be hereafter ſhown; and as vain is the reaſon that the Judges are Councel for the Priſoner, which they ought to be, but I doubt it will be ſuſpected, that in this caſe, and many others, they did not make the beſt of their Clients Caſe; nay, generally have betrayed their poor Client, to pleaſe, as they apprehended, their better Client, the King; for ſo they ſay, They are to be Counſel likewiſe for the King in Indictments, that is to ſay, They are to be indifferent and upright between both,

both, ſo certainly they are to be in Appeals; therefore that is not the reaſon why no Councel is allowed the Priſoner in the Indictment, but the true reaſon in probability is, that the Priſoners in Indictments are generally ſo very poor that they could not be at the charge of having Councel, and ſo non-uſage gave colour of a Law.

The other reaſon my Lord *Coke* gives for it, is, That much of truth may be diſcerned by the Priſoners Behaviour, or Anſwers, which would be concealed if he ſpoke by another, is not ſatisfactory; for the ſame is to be ſaid in an Appeal. As to the publick it is not material whether a man is proſecuted and puniſht by an Indictment, or an Appeal; and that Appeals are leſs frequent than Indictments, is only that the firſt is more chargeable than the laſt, for tho we hear not of late of any Appeals but in Murder, yet they lie in Robbery, Burglary, Felony, and in all Crimes at Common Law puniſhable by loſs of Life or Member; but tho the rule in Indictments, is, That no Councel is allowed, yet it is confined to the Trial, no Law, Common, or Statute, nor any Uſage ſays, A Priſoner ſhall not have Councel to adviſe him before or after the Trial; and in Murther and all other Crimes, it is always admitted, and why not in Treaſon?

In Treaſon, ſays ſome, 'tis Criminal for one to adviſe or ſollicite for the Priſoner; and the Kings Councel ſaid, He had known one Indicted for being a Sollicitor for one in High Treaſon; and ſays the Court, It is Criminal for one to be Sollicitor or Councel in Caſes of High Treaſon, unleſs aſſigned by the Court, and whether it be ſo or not is worth enquiry.

Firſt, No Law Book as to this matter makes any difference between Treaſon, and other Crimes, and adviſing and ſolliciting is ſpoken of in general terms, which being reduced to Particulars, will ſhew the abſurdity of it.

Suppoſe I obſerving the Indictment on which the Priſoner was arraigned, was erroneous, and ſhould therefore adviſe him to move and quaſh it for that error; for, ſay I, If you ſhould be tried on this Indictment, and found guilty, unleſs you move in Arreſt of Judgment, you will be attainted, and then you can take no advantage of that error, and if you be acquitted you may be Indicted again, and Tried again, becauſe the firſt Indictment was Erroneous.

If this be Law as none can deny it, is it not lawful to adviſe him? and is it not fit for the Court to quaſh the Indictment if faulty, notwithſtanding all the Cant of Dilatories, Subterfuges, and defending himſelf by plain matter of fact? Or ſuppoſe I adviſe in fact that I hear that ſuch a witneſs is to come againſt him, I know he is hired to do the Jobb, and I will prove it on him if called. Or ſuppoſe I tell him, I know ſuch a witneſs is convict of Perjury, and if he will call me, I will produce the Records of his Conviction; can any Lawyer

ſay

ſay theſe things are Criminal? but if I ſhould adviſe a Priſoner to eſcape out of Priſon, ſhewing him the way of doing it, it is Criminal.

In all Caſes comforting a Traitor is Treaſon, but it is meant where you do it to keep him from Juſtice, for elſe feeding a Traitor in Priſon is Treaſon, which none will affirm. So that reducing general words to particular facts, clears the Sophiſtry of them; nor is it Criminal to be a Sollicitor in Treaſon, for where there is no poſitive Law, as in this caſe there is not, natural reaſon muſt take place; and better reaſon cannot be given than what the Priſoner in this Caſe gave; If a man be coup'd up and not ſuffered to go about his buſineſs himſelf, and no friend muſt be employed to do it for him, how is it poſſible for him to make his defence? I know it is ſaid his Innocence muſt defend him, but the folly of that ſaying ſhall be ſhewn in another place; but ſay they, The Court ſhall aſſign him a Councel and Sollicitor; but when, and for what? only for a Point of Law. May not a Priſoner want a Sollicitor for a matter of Fact? Suppoſe he had Occaſion for a Witneſs which he could not readily find, or occaſion for a Copy of Record, for want of which Mr. *Corniſh* ſuffered; was it not reaſonable for him to have a Sollicitor? And when ſhall the Court aſſign him a Sollicitor; only when the Priſoner comes upon his Trial, and then it is too late to have any uſe of him; as *Colledge* was, Arraigned at Twelve, and Tryed at Two a Clock the ſame day, and as was Mr. *Corniſh*'s Caſe. But, ſay the King's Council, They had known one Indicted for High Treaſon for being a Sollicitor in ſuch a Caſe; though I do not believe it, yet that Authority goes no farther to prove the matter, than an Indictment I knew againſt a Perſon once, for ſtealing an Acre of Land; and againſt another for wickedly and devilliſhly breaking an Award, whereby two unjuſt Arbitrators directed the Priſoner to convey his Land to a certain Lord, without any Satisfaction or Recompence, proved thoſe Matters to be Felonies.

But though a Priſoner may be adviſed, yet that Advice muſt not be reduced to Writing. Then ſuppoſe one Mans Memory be good, and can bear all the Advice given him; and another Mans Memory bad, and cannot do it: Is not the laſt Hanged for having a bad Memory, rather than for his Crime? But though it may be reduced to Writing, yet it muſt be his own Hand-writing, and not anothers; how ridiculous is the diſtinction? Suppoſe the Priſoner cannot write, then is he Hang'd for his Parents Fault or Misfortune, for not Educating him, or for not being able to Educate him better.

Which

Which is ſomewhat of kin to the late Practice in the *Weſt*, where many Men were Hang'd for having old Jewiſh Names, as *Obediah*, or the like, with a Jeſt, that their God-fathers Hang'd them. But ſuppoſe it is not lawful in general to be a Councel or Sollicitor, with, or to a Priſoner committed for High Treaſon, yet the Proſecutions being the King's, he may give a Privilege, which the Law of Courts doth not allow, and in this Caſe it was ſo done; for, to the Confuſion of thoſe who did this Injury, and of thoſe Judges who would not do the Priſoner Right, they have printed the Orders of the King and Council, which appointed Mr. *Weſt* and *Aaron Smith* to be his Councel and Sollicitor.

If it was lawful for the Priſoner to have Counſel and to have Advice in Writing; it was very unlawful and as high a miſdemeanour in the King's Councel to order his Papers to be taken away, as they were capable of being Guilty of, both the Priſoner and the Matters of his Defence being under the Protection of the Court.

It is not an ancient practice the ſeizing of Papers, though of late uſed; it began, I believe, upon my Lord *Coke*, whoſe Papers were ſeized and carried to the Secretaries Office, upon the like Pretences as of late, and when returned were gelt of many Bonds and other Securities, to a great many Thouſand Pounds value, which never came to light. It was afterwards practiſed upon ſome Members of Parliament, and, as I remember, voted Illegal, as undoubtedly it is; for though, ſometimes, you may meet with Papers which may be Evidence againſt the Priſoner; ſo it is poſſible, that other Papers, than the Priſoners may be mixed with his to make good an Accuſation; nay, which is worſe, ſome of the Priſoners may be withdrawn, which may be the only matter of his Defence; and that hath been often practiſed: And I cannot but remember a Story about this Matter. When Sir *William Jones* died it was ſaid, That one from *Whitehall* offered Sir *William Jones* his Servant a great Summ of Money but to let him ſearch his Maſter's Study, to find a Paper which would diſcover great Matters. A certain perſon diſcourſing with a Privy-Councellor about it, the Privy-Councellor ſaid, It was not true; for, ſays he, if we had a mind to have done it, could we not ſend a Meſſenger on pretence of ſearching for treaſonable Papers, and bring all the Study to *Whitehall*, and keep what we would of them?

But though that hath been often practiſed, yet this was the firſt time that ever a Priſoner had the Inſtructions for his Defence taken away from him; and the manner was worſe than the thing, it being done juſt as he was coming to his Trial, relying upon his Writing, not his Memory for his defence; beſides the Agony ſo great an Injury put him in, when he had ſo great a concern upon him, as the Trial for his Life, and he could not but know by all that Preparation, that it was more than ten to one againſt him; all which is well ſeen in his Trial, where he ſo pathetically and ſenſibly preſs'd the Court for Juſtice in this matter, which they excuſed with ſuch mean Anſwers, that all mankind muſt ſee they were ſatisfied of the Injuſtice, and were reſolved not to do him Right; They knew not which way he came by the Papers; they knew not but he may be Criminal who brought them him; they knew nothing of his Papers; they knew not what Papers he meant; that his Lordſhip did not take them away, and ſuch like ſtuff, as if it was not the Duty of the Court to relieve the Priſoner againſt the Oppreſſion of any Perſons but themſelves; elſe why did they not ask *Murrel* and *Sawel*, who ſtood by, and were charged with taking them for the Papers, and have ſatisfied themſelves of them; but in truth they knew before what they were. And *Colledge* was a true Prophet, when finding his Life ſo beſet, he ſaid, This is an horrid Conſpiracy to take his Life: But it would not ſtop there, for it was againſt all the Proteſtants in *England*, and the Rule the Court made at laſt was as unjuſt, That he ſhould have the uſe of ſome of his Papers after he had pleaded not Guilty, but not before; for ſuppoſe there was matter in them which could not be made uſe of after ſuch Plea, as a Plea to the Juriſdiction of the Court, a Pardon, otherwiſe acquitted and the like, could not be pleaded, or advantage taken of them after not Guilty pleaded; although there was not ſuch yet there might have been ſuch Pleas, for ought the Court knew. How unjuſt then was it for him to plead not Guilty before he ſhould have the uſe of his Papers? but there was matter in them for quaſhing the Indictment; and he hinted ſo much to the Court as that the Indictment contained Crimes of different Nature, as Treaſon and Miſdemeanour, and I think it was good Cauſe to quaſh the Indictment.

In all Civil Matters, two matters of different Natures cannot be put into one Action, as Debt and Treſpaſs; two Capital Crimes of different Natures cannot be joined in one In-

Indictment, as Murder and Robbery; and for the ſame, and another Reaſon, Treaſon and Miſdemeanour cannot be joined in one Indictment; for the Jury may obſerve that one part of the Indictment, which in it ſelf is but miſdemeanour, as that he ſaid, The King minded nothing but beaſtlineſs, *&c.* though charged in the Indictment as Treaſon, was proved, and not the material parts of the Indictment, as deſigning to ſeize the Kings Perſon, *&c.* and finding ſome part of the Indictment proved, might find him guilty generally, which extends to every Article of the Indictment, and ſo the Jury deceived, and the Priſoner in danger; or ſuppoſe he was acquitted on ſuch an Indictment, if it ought to have been quaſhed, whether the Priſoner ſhew the Error, or not, he may be Tried again upon another good Indictment for the ſame Treaſon: If therefore what he offered was an error, or but like an error in the Indictment, by the Law which favours life, and the jeopardy of life, the Court ought not to have Tried him on that Indictment, but have directed another Indictment to have been found: It is a vain objection to have ſaid, that that would have been troubleſome. Is the miſchief of that comparable to that of putting a man twice in jeopardy of his life for the ſame thing? but it would have been a delay. I ſay none; for there was a Grand Jury in Court, and within the two hours time the Court adjourned, for (to give the King's Councel opportunity of viewing the Priſoners Papers, which were taken from him, and to conſider of the method of his Proſecution by them, which they did, and altered it from what they at firſt deſigned it;) the King's Councel might have had a new Bill found, but peradventure they could not prevail with that Grand Jury to have found a new Bill; they remembred they had ill luck with the firſt Bill at *London*; that I believe was the true reaſon; but becauſe I'll do the Court no injury, in imputing that to the cauſe of the adjournment, which was not; 'tis true, in the Printed Trial, 'tis pretended they adjourned, in order to Dine; yet thoſe that knew that the adjournment was by the direction of the King's Councel, and overheard their whiſpering with the Chief Juſtice, (which is both an undecent and an unjuſt thing, and is neither better nor worſe than a Plaintiff or Defendants whiſpering a Judge while his Caſe is before him Trying;) and I know that the Judges had Breakfaſted but a little before, and had no great ſtomach to their Dinners, and therefore believe, that that before aſſigned, and not what pretended, was the true cauſe. They might better have put off their Dinner to their Supper, than their Supper

to

to their Breakfaſt, as they did, the Trial laſting till early next Morning.

But becauſe all irregularities of Court and Councel, in all theſe matters, are ſhifted off and excuſed by two Sayings not underſtood generally; the firſt whereof is, That the Court is to act for the King, and the Councel are for the King, and no perſon muſt come near the Priſoner to the prejudice of the King, as in *Fitz-Harris* his Caſe was often ſaid; a Witneſs was permitted to go on in an impertinent ſtory, on a Tranſaction between him and my Lord *Shaftsbury*, in my Lord *Ruſſell*'s Trial, of which the Priſoner complained that it was deſigned to incenſe the Jury; and though the Chief Juſtice declared it was not Evidence, yet he a great while afterward went on in a like manner; nay, the Councel, in ſumming up the Evidence, repeated the ſame matter, which was permitted, becauſe it was for the King; and yet when the Earl of *Angleſey* began to ſay what the Lady *Chaworth* told him, he was ſnub'd, and cut ſhort; and Mr. *Edward Howard* was ſerved the ſame ſauce, becauſe it was againſt the King: It is fit therefore to know what is meant in Law by thoſe words. No body doubts what the Courts or King's Councel of late days meant; but in Law they are not ſo meant, for though many things are ſaid to be the King's, as the Protector of his people, and more concerned in their welfare than any private perſons, yet they are ſo in preſervation, and not in property or intereſt. The Highways are the King's, in preſervation for the Paſſage of his Subjects, and whoever obſtructs them wrongs the King; as he is hurt when his Subjects are hurt, but in property the Soil generally belongs to private Perſons; the King is hurt when his Subjects are oppreſt by force, becauſe he has engaged to defend them, and therefore the Offender is puniſhed by the King, to deterr the Offenders and others from committing the ſame offences, which is for the benefit of the publick; but as a Man may be oppreſt by open force, ſo he may be oppreſt by private inſinuations, and falſe accuſations, and the King has engaged to defend his Subjects from ſuch; not that it is poſſible to prevent them, but by conſequence, that is by puniſhing ſuch as ſhall be found guilty of ſuch Crimes, which heretofore were puniſhed with the higheſt Arbitrary Puniſhments we read of: The conſequence is, That it is for the King to puniſh Offenders, to acquit the falſe accuſed, and to puniſh the falſe accuſers; that is to ſay, In all Caſes to do right, according to Law and Truth.

Surely

Surely Queen *Elizabeth* gave the beſt explanation of the words, when the Lord *Burleigh*, ſeeing Sir *Edward Coke*, the then Attorney General, coming towards her, he ſaid, *Madam*, here is your Attorney General, *Qui pro domina Regina ſequitur.* Nay (*ſays ſhe*) I'll have the words altered, for it ſhould be, *Qui pro Domina veritate ſequitur.*

For the King and for Truth, then are ſynonymous words; for the King againſt the Truth is a contradiction, and the Judges and King's Councel having taken an Oath to adviſe the King according to the beſt of their cunning, which is according to Law and Truth; if therefore the King's Councel uſe means, and the Court permit them ſo to do, to ſuppreſs Truth, or to diſable the Priſoner from making his innocence Appear, as in *Colledge* his Caſe was done; if they urge things as Evidence of the Crime whereof the Priſoner is accuſed, which by Law are not Evidence, as in this Caſe, in the Lord *Ruſſell*'s Caſe, Collonel *Sydney*'s Caſe, Mr. *Hambden*'s Caſe, Mr. *Corniſh*'s Caſe, and in many more they did, and has in ſome of them ſhall be hereafter ſhewn. If they inſinuate any fact as Evidence, which is not proved, as in my Lord *Ruſſell*'s Trial, that my Lord of *Eſſex* killed himſelf; if they wreſt as Evidence of the fact, which in ſence is not ſo; as in Collonel *Sydney*'s Caſe, the writing his Book; for, for any thing appeared, it was writ before King *Charles* the Second came to the Crown; they are Councel, againſt the King, being againſt Truth as well as againſt the Priſoner.

I think no Man will deny the truth of this propoſition, That it is as much the King's intereſt, to have an innocent, accuſed of Treaſon, acquitted, as it is to have a nocent, accuſed of Treaſon, convicted: If that be true, then let any one ſhew me a reaſon if he can; for there is no Law againſt it, why he may not have the ſame liberty of clearing his innocence, as the proſecutor hath of convicting him; I mean by free and private acceſs of all perſons, to the Priſoner, as is uſed in all other capital matters; if it be ſaid he may get ſome to corrupt the witneſſes againſt him, or ſubborn others for him, the ſame may be ſaid in all other matters; but in Treaſon that is not a likely matter, for generally the Priſoner never knows what he is accuſed of, and conſequently cannot know his Accuſer, nor know how to provide a counter-Evidence, till he comes to be Arraigned, and then it is too late; for generally he is preſently Tried after his Arraignment, as was the Caſe of *Colledge*, and my Lord *Ruſſel*, and Mr. *Corniſh*; and per-

ſons committed for Treaſon are ſo much the leſs able to corrupt or ſuborn Witneſſes than any other Criminals, that they generally, according to the late practice, have no Accuſer brought face to face to them on their Commitment, as all other Criminals have, who always are commited upon an Accuſation made upon Oath in their Hearing, and their Defence heard before their *Mittimus* made; and whatever the pretence may be, yet, in experience, it is found more perjuries in proſecutions for Treaſon by the Accuſers committed than by the Witneſſes for the Priſoner.

One reaſon is, a Witneſs in Treaſon is more difficultly convicted than in any other Crime, for Treaſon is an *Ignis fatuus*, 'tis here and there, as *Colledge* was firſt in *London* then in *Oxford*; it is not confined to place or time, as all others Crimes are; in all other Crimes, as Murther, Robbery or the like, it muſt be proved to be within the County where laid; it muſt be of the perſon named in the Indictment, which are Evidences of Fact, which in ſome ſort prove themſelves. And there was but one that I remember (for *Oates* I do not count one) was ever juſtly convicted of Perjury in Treaſon, and that too was for want of cunning, for he fooliſhly Swore to time as well as place, which a Witneſs in Mr. *Hambden*'s Trial would never be brought to do: Beſides, Malice and Revenge, which in Proſecutors and Accuſers in Treaſon are generally the Motives, go farther than Money or Kindneſs, which if uſed in any Caſe, are the Motives of falſe Witneſſes for the Priſoner.

Now as for the King, and for the Truth are the ſame, ſo for the King and for the Law are the ſame. The Laws are the King's, as he is to ſee the Execution and Preſervation of them; ſo for the King againſt the Law, is a contradiction.

Therefore, to Try a Priſoner upon a vitious Indictment, as was done in *Colledge*'s and Collonel *Sydney*'s Caſes, is againſt the King, as it is againſt Law, for by that means he is in danger to be Hang'd if Convicted; or Tryed twice, if acquitted, which is againſt Law.

It is no Salve of the matter what the Judges ſaid in *Colledge*'s Caſe, that the Evidence of Miſdemeanour is no Evidence of Treaſon; for the ſame may be ſaid in an Indictment of Murder and Robbery; nor that the Judges would take care to inform the Jury which was Evidence of Treaſon, which of Miſdemeanour, which they promiſed to do, but were not as good as their words, as ſhall be ſhewn;

ſhewn; for the Court may forget ſo to do, and the Jury may forget what the Court ſaid to them of that matter.

But notwithſtanding all this, if the Priſoner was innocent, there could be no harm done to him, for his Innocence would defend him; this was a ſaying, and as mortal it was to *Fitz-harris*, to *Colledge*, to Colonel *Sydney*, to Mr. *Cornish*, and ſeveral others, as was the Letter Θ amongſt the *Greeks*. It is true, my Lord *Coke* uſed the Expreſſion, but in another ſence than what of late practiſed; I would fain know what they mean by the Expreſſion; is it, That, no man will or ever did ſwear falſely againſt a Priſoner in Treaſon; if that be true, how came the ſame Perſons to be ſo violent againſt *Oates* for what he ſwore againſt *Ireland*? or do they mean, that, let an accuſer ſwear never ſo violently and circumſtantially againſt a Priſoner, yet if he be innocent, it will do him no harm; if that be true, I would fain know how the Priſoner ſhall eſcape; is it that his Innocence ſhall appear in his Forehead, or ſhall an Angel come from Heaven and diſprove the Accuſer? neither of which we have obſerved, though all have ſaid, and I believe, that ſome Perſons have been very innocently Executed. Or ſhall the Accuſer be detected by the bare Queſtions of the Priſoner? that I think will not be neither; and therefore to inſtance in the only perſon who hath of late eſcap'd in a Trial of Treaſon, where there was a deſign againſt his Life, which was my Lord *Delamere*, if he had not had Witneſſes, to have proved the perſons mentioned to have been with him at the place and time ſworn againſt him to be in other places, it was not his denial had ſerved his turn, but he would have run the ſame fate with my Lord *Brandon*. Nay, I am apt to think had he been Tried by a Jury of Commoners packed, as at that time they uſually were, he had not eſcaped.

The truth is, when I conſider the practice of late times, and the manner of uſage of the Priſoners, it is ſo very much like or rather worſe than the practice of the Inquiſition, as I have read it, that I ſometimes think that it was in order to introduce Popery, and make the Inquiſition, which is the moſt terrible thing in that Religion, and which all Nations dread, ſeem eaſie in reſpect of it. I will therefore recount ſome undeniable Circumſtances of the late practice. A man is by a Meſſenger, without any Indictment precedent, which by the Common Law ought to precede, or any Accuſer or Accuſation that he knows of, clapt up in cloſe Priſon, and neither Friend or Relation muſt come to him; he muſt have neither Pen, Ink,

Ink, or Paper, or know of what, or by whom he is accuſed ; he muſt divine all , and provide himſelf of a Counter-evidence without knowing what the Evidence is againſt him. If any Perſon adviſe or ſollicite for him, unleſs aſſigned by the Court, by which he is Tried , they are puniſhable ; he is Tried as ſoon as he comes into the Court ; and therefore of a Sollicitor there is no occaſion or uſe ; if the Priſoner deſires Councel upon a Point of Law , as was done in my Lord *Ruſſell*'s Trial , the Councel named muſt be ready to argue preſently, and the Court deliver their Judgment preſently, without any conſideration. The Priſoner indeed hath liberty to except to Thirty-five of the Jury peremptorily , and as many more as he hath cauſe to except to, but he muſt not know before hand who the Jury are ; but the King's Councel muſt have a Copy of them ; he muſt hear all the Witneſſes produc'd to prove him Guilty together , without anſwering each as he comes , for that is breaking in upon the King's Evidence , as it is called ; Though it hold many hours , as it happened in moſt of the Trials ; he muſt not have any perſon to mind him what hath been ſworn againſt him, and forgotten by him to anſwer ; for if that were allowed, the Priſoner perhaps may eſcape Hanging, and that is againſt the King ; there is a Proclamation to call in all Perſons to ſwear againſt him , none is permitted to ſwear for him ; all the impertinent Evidence that can be given is permitted againſt him, none for him; as many Councel as can be hired is allowed to be againſt him, none for him. Let any perſon conſider truly theſe Circumſtances, and it is a wonder how any perſon eſcapes ; it is downright tying a man's hands behind him, and baiting him to death , as in truth was practiſed in all theſe Caſes. The Trial of *Ordeal*, of walking between hot Iron Barrs blindfold , which was aboliſhed for the unreaſonableneſs of it ; though it had its ſaying for it too , That God would lead the blind ſo as not to be burnt , if he were innocent, was a much more advantageous Trial for the ſuſpected , than what of late was practiſed, where it was ten to one that the accuſed did not eſcape ; if any of theſe things have been legally practiſed , I have nothing to ſay againſt it , but I have never read any thing of Common or Statute-Law for it. And I can with better aſſurance ſay than any perſon who hath practiſed theſe things , that no Law in *England* warrants them ; and if not , then conſider the unreaſonableneſs of theſe Methods.

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There is yet one Objection to be answered, which being a very great hardship upon the Prisoner, gives some colour of imposing other hardships upon him, to wit, That a Witness cannot be examined for the Prisoner on his Oath in a Tryal upon an Indictment of a Capital Matter. It is not because the Matter is Capital, for then no Witness ought to be examined upon Oath for the Appellee in a capital matter: Neither is it because it is against the King, for then no Witness ought to be examined on Oath for the Defendant in a Tryal upon an Indictment of any Criminal Matter, yet in Indictments of all Criminal Matters, not Capital, 'tis permitted to the Prisoner.

To say Truth, never any reason was yet given for it, or I think can be, if you believe my Lord *Coke 3d Instit. fol* 79 of which Opinion my Lord *Hales* is, in his Pleas of the Crown, that that Practice is not warranted by any *Act of Parliament*, Book Case, or antient Record, and that there is not so much as *scintilla Juris* for it; for he says, when the fault is denied, truth cannot appear without Witnesses. As for what is pretended, that it is swearing against the King, and therefore it is not allowed of, 'tis a Cant Reason, which put into sensible English, a man will be ashamed to own. And as slight is the Reason, That it being a matter of so high moment as a man's Life, the Prisoner will be the more violent and eager, and the Witnesses may be more prevailed upon to swear falsly, more than they would be in a matter of less moment: The weakness of that reason hath been in part shewn, and shall be further shown. I think none will deny, but the end of all Tryals in any matters Capital, Criminal, or Civil, is the discovery of Truth; Next, 'tis as necessary for the Prisoner to have Witnesses to prove his Innocence, as it is for the King to have Witnesses to convict him of the Crime; which Proposition is agreed by the Practice, it being alwaies permitted, that the Prisoner shall produce what Witnesses he can, but they are not to be upon Oath. In the last place, since truth cannot appear but by the confession of the party, or testimony of Witnesses of both sides, it is necessary to put all the engagement as well on the Witnesses of part of the Prisoner, as of part of the King, to say the Truth, the whole Truth, and nothing but the Truth, as the Nature of the matter will bear; and as yet no better means hath been found out than an Oath. Which if denyed to the *Prisoner's Witnesses*, either he is allowed too great an advantage to acquit himself, or he is not allowed enough.

If all that his Witnesses say without Oath, shall have equal credit as if they swore it, then he hath too much advantage; for men may be found which will say falsly what they will not swear, as is plain enough, How often doth a Defendant say in a *Plea* at Law, that a Deed is not his, which yet in an Answer in *Chancery* he will confess to be his? If his Witnesses shall not have Credit because not sworn, to what purpose then

is it permitted him to produce them? If they ſhall have ſome Credit, but not ſo much as if ſworn, I ask how much credit ſhall be given? Is it two, three, or ten Witneſſes without Oath ſhall be equivalent to One upon Oath? And beſides that that Queſtion never was or can be anſwered, what credit ſhall be given them? There is an unreaſonable diſadvantage put on the *Priſoner*, that a Witneſs produced of his part, of equal credit with the Witneſs againſt him, ſhall not have equal credit given him, becauſe he is not on his Oath, whereas he is ready to deliver the ſame things on his Oath, if the Court would adminiſter it to him; and yet that difference was taken in *Fitzharris* his Caſe, as to the Credibility of *Everard* and *Oates*; the firſt being upon his Oath, the laſt not.

But I do not offer this as any Reflection upon the late Proceedings, but as a reaſon why matters in Capital Proceedings ought not to have been carried further than heretofore they were, againſt the *Priſoner*, by example of ſo unreaſonable a practice.

But to return to the Tryal of *Colledge*, which came on in the Afternoon, when the Attorney inſiſted that the King's Witneſſes ought not to be examined out of the hearing of each other; in which he was over-ruled, but the Rule not obſerved, nor was it material; for the King's Counſel having the Priſoners Writings, and by them obſerved how he intended to make the Witneſſes againſt him contradict themſelves, they did not produce ſuch Witneſſes, as were not inſtructed to concur in the Evidence of the ſame matter, but produced only ſuch as were inſtructed to give Evidence of diſtinct matters; and therefore *Dugdale* was firſt produced, who gave Evidence of villifying words ſpoke of the King at ſeveral times at *Oxford*, and *London*, by the *Priſoner* to himſelf alone; that he ſhewed the Witneſs ſeveral ſcandalous Libels and Pictures, and ſaid he was the Author of them; that he had a ſilk Armor, a brace of Horſe *Piſtols*, and a pocket Piſtol, and Sword; that he ſaid, He had ſeveral ſtout men to ſtand by him, and that he would make uſe of them for the defence of the Proteſtant Religion; he ſaid the King's *Party* was but an handful to his *Party*. *Stevens* ſwore the finding of the Original of the *Raree Show* in the Priſoners Chambers. *John Smith* ſwore his ſpeaking ſcandalous words of the King, and of his having Armor, and that when he ſhewed it the Witneſs, he ſaid, *Theſe are things that will deſtroy the pitiful Guards of* Rowley; that he ſaid, he expected the King would ſeize ſome of the Members of Parliament at *Oxford*; which if done, he would be one ſhould ſeize the King; that he ſaid, *Fitz-Gerald* at *Oxon* kad made his Noſe bleed, but before long he hoped to ſee a great deal more blood ſhed for the Cauſe; that if any, nay, if *Rowley* himſelf, came to diſarm the City, he would be the Death of him. *Haynes* ſwore he ſaid, Unleſs the King would let the *Parliament* ſit at *Oxon*, they would ſeiſe him, and bring him to the Block; and that he ſaid,

The

The City had One thouſand five hundred Barrels of *Powder*, and One hundred thouſand men ready at an hours Warning. *Turbervile* ſwore he ſaid at *Oxford*, That he wiſhed the King would begin; if he did not, they would begin with him, and ſeize him; and ſaid he came to *Oxford* for that purpoſe.

Mr. *Maſters* ſwore, That in diſcourſe betwen him and the Priſoner, he juſtified the *Proceedings* of the *Parliament* in 1640. at which the Witneſs wondred, and ſaid, how could he juſtifie that *Parliament* that raiſed the Rebellion, and cut off the King's head? To which the *Priſoner* replied, That that *Parliament* had done nothing but what they had juſt cauſe for; and that the *Parliament* which ſate laſt at *Weſtminſter* was of the ſame Opinion: That he called the *Priſoner* Collonel in mockery, who replyed, Mock not; I may be one in a little time.

Sir *William Jennings* ſwore as to the Fighting with *Fitz-Gerald*, and the words about his bleeding.

For the Priſoner.

Hickman ſaid he heard *Haynes* ſwear *God damn him*, he cared not what he ſwore, nor whom he ſwore againſt, for it was his Trade to get Money by ſwearing. Mrs. *Oliver* ſaid *Haynes* writ a Letter in her Father's name, unknown to her Father. Mrs. *Hall* ſaid ſhe heard *Haynes* own that he was employed to put a *Plot* upon the Diſſenting Proteſtants. Mrs. *Richards* ſaid ſhe heard him ſay the ſame thing. *Whaley* ſaid *Haynes* ſtole a Silver Tankerd from him. *Lun* ſaid, *Haynes* ſaid the *Parliament* were a company of Rogues for not giving the King money, but he would help the King to money enough out of the *Phanaticks* Eſtates. *Oates* ſaid *Turbervile* ſaid, a little before the Witneſſes were ſworn at the *Old-baily*, that he was not a Witneſs againſt the *Priſoner*, nor could give any Evidence againſt him. And after he came from *Oxford*, he ſad he had been ſworn before the Grand Jury againſt the *Priſoner*, and ſaid the Proteſtant Citizens had deſerted him, and *God damn him* he would not ſtarve. That *John Smith* ſaid *God damn him* he would have *Colledge's* Blood. That he heard *Dugdale* ſay, that he knew nothing againſt any *Proteſtant* in *England*; and being taxt that he had gone againſt his Conſcience in his Evidence; he ſaid it was long of Collonel *Warcup*, for he could get no money elſe; that he had given out, that he had been poiſoned, whereas in truth it was a Clap. *Blake* ſaid, that *Smith* told him *Haynes* his Diſcovery was a Sham-Plot, a Meal-tub-Plot.

Bolron ſaid, *Smith* would have had him give Evidence againſt Sir *John Brooks*, that Sir *John* ſhould ſay there would be cutting of Throats at *Oxford*, and that the Parliament-men went provided with four, five, ſix, or ten men a-piece; and that there was a Conſult at *Grantham*, wherein it was reſolved, that it was better

better to ſeize the King than to let him go, whereas he knew of no ſuch thing; that he would have *Bolron* to be a Witneſs againſt *Colledge*, and told him what he ſhould ſay, leſt they ſhould diſagree in their Evidence; that he heard *Haynes* ſay he knew nothing of a *Popiſh* or *Presbyterian Plot*, but if he were to be an Evidence, he cared not what he ſwore, but would ſwear any thing to get Money. *Mowbray* ſaid, *Smith* tempted him to be a Witneſs againſt *Colledge*, and was inquiſitive to know what diſcourſe paſſed between him, the Lord *Fairfax*, Sir *John Hewly*, and Mr. *Stern* on the Road; and ſaid, that if the Parliament would not give the King Money, and ſtood on the Bill of Excluſion, that was pretence enough to ſwear a deſign to ſeize the King at *Oxford*. *Everard* ſaid *Smith* told him he knew of no *Presbyterian* or *Proteſtant Plot*, and ſaid Juſtice *Warcup* would have perſwaded him to ſwear againſt ſome Lords a *Presbyterian Plot*, but he knew of none; he ſaid, *Haynes* told him it was neceſſity and hard pay drove him to ſpeak any thing againſt the *Proteſtants*; and being queſtioned how his Teſtimony agreed with what he formerly ſaid? anſwered, he would not ſay much to excuſe himſelf, his Wife was reduced to that Neceſſity, that ſhe begged at *Rouſe*'s door, and meer neceſſity drove him to it, and ſelf preſervation; for he was brought in Guilty when he was taken up, and was obliged to do ſomething to ſave his Life; and that it was a Judgment upon the King or People; the *Iriſh-mens* ſwearing againſt them was juſtly fallen on them, for outing the *Iriſh* of their Eſtates. *Parkhurſt* and *Symons* ſaid they had ſeen at *Colledge* his Houſe, his Arms about the latter end of *November*. *Tates* ſaid *Dugdale* beſpoke a Piſtol of him for *Colledge*, which he promiſed to give *Colledge*. And upon Diſcourſe ſometimes after the *Oxford Parliament*, *Tates* ſaid *Colledge* was a very honeſt man, and ſtood up for the good of the King and Government. *Tes*, ſaid *Dugdale*, *I believe he does, and I know nothing to the contrary*. *Deacon* and *Whitaker* ſaid they knew *Colledge* was bred a *Proteſtant*, and went to Church, and never to a Conventicle that they knew of, and thought him an honeſt man. *Neal*, *Rimington*, *Janner* and *Norris* to the ſame purpoſe; and *Norris*, that *Smith* (in company where was Speech that the *Parliament*-mens being agreed to go to *Oxford*) ſaid, he hoped they would be well provided to go, if they did go. *El. Hunt* ſaid, a Porter in her Maſter's abſence brought the Prints taken in *Colledge*'s houſe eight weeks before, and ſaid *Dugdale* told her, after her Maſter was in Priſon, he did not believe *Colledge* had any more hand in any Conſpiracy againſt his Majeſty, than the Child unborn, and he had as lieve have given an hundred pounds he had never ſpoke what he had, and that he had nothing to ſay againſt her Maſter, which would touch his Life.

Having

Having ſummed up all the material part of the Evidence in the order it was given, for, or againſt the Priſoner, let us ſee whether upon the whole, an honeſt underſtanding Jury could, with a good Conſcience, have given the Verdict the then Jury did; or whether an upright Court could, with a good Conſcience, have declared they were well ſatisfied in the Verdict given, as all the four Judges in that caſe did, though the Chief Juſtice *North* only ſpoke the words. And, though it is too late to Advantage the deceaſed, yet it will do right to the Memory of the man, to whoſe dexterous management on his Tryal many now alive owe the continuance of their lives to this Day; it was not their Innocence protected the Lord *Fairfax*, Sir John *Brooks*, and many others before mentioned, and many not named in the Tryal, but *Colledge*'s baffling that Crew of Witneſſes, and ſo plainly detecting their falſehood, that the Kings Counſel never durſt play them at any other perſon, but the Earl of *Shaftsbury*, as ſhall be ſhewn, and failing there, they were paid off, and vaniſht, and never did more harm viſibly, what under-hand Practices they might be hereafter guilty of, I know not.

Who could believe any one of thoſe four Witneſſes, *Dugdale*, *Haynes*, *Turbervile*, and *Smith*, if it were for no other reaſon than the improbability of the thing, that (as *Colledge* ſaid) was it probable he ſhould truſt things of that nature with Papiſts, who had broke their Faith with their own Party, who could lay greater Obligations of ſecreſie upon them than he was able to do? That he, a Proteſtant, ſhould truſt people who had been employed to cut Proteſtants Throats? And neither of them ever diſcovered any of the things they ſwore, till after the *Oxford* Parliament, though moſt of them were pretended to be tranſacted and ſpoken before?

Who could believe *Dugdale* in any part of his Evidence againſt the Priſoner, when *Oates* teſtified againſt him, that he ſaid he knew nothing againſt any Proteſtant in *England*? And being taxt by *Oates*, that he had gone againſt his Conſcience, in his Evidence againſt *Colledge* to the Grand Jury at *London*, he ſaid, *it was long of Coltonel* Warcup, *for he could get no Money elſe*; which was a plain Confeſſion he had ſworn wrong, and Confeſſion of the Cauſe for which he did it, and of the perſon by whom he was induced to do it? That he had given out that he was poiſoned, whereas his diſeaſe was a Clap, which was an ill thing in him, as it implyed a charge of poiſoning him on other perſons? And when *Elizabeth Hunt* teſtified againſt him, that he ſaid, after *Colledge* was in Priſon, that he did not believe *Colledge* had any more hand in any Conſpiracy againſt the King, than the Child unborn; and that he had as lieve have given an 100 *l.* he had never ſpoken what he had, and that he had nothing to ſay againſt *Colledge* which could touch his Life? And

when *Yates* teſtified againſt him, that when *Yates* ſaid *Colledge* was an honeſt man, and ſtood up for the good of the King and Government; *yes*, ſaid *Dugdale*, *I believe he does, and I know nothing to the contrary*?

Who could believe *Haynes* in any part of his Evidence againſt the Priſoner, when Mrs. *Hall* and Mrs. *Richards* ſaid, he owned he was employed to put a Plot upon the Diſſenting Proteſtants? when *Whaley* teſtified againſt him that he was a Thief, and had ſtole *Whaley*'s Tankerd? when *Lun* teſtified that *Haynes* ſaid the Parliament were a Company of Rogues, for not giving the King money, but he would help the King to Money enough out of the *Phanaticks* Eſtates? when *Hickman* teſtified againſt him he heard him ſay, *God damn him* he cared not what he ſwore, nor againſt whom he ſwore, for 'twas his Trade to get Money by ſwearing? when Mrs. *Oliver* ſaid that he had writ a Letter in her Fathers name, without her Fathers knowledge? when *Bolron* teſtified againſt him, that he ſaid he knew nothing of a *Popiſh* or a *Presbyterian Plot*, but if he were to be an Evidence, he cared not what he ſwore, but would ſwear any thing to get Money? when *Everard* teſtified againſt him, that he ſaid Neceſſity and hard Pay drove him to ſay any thing againſt the *Proteſtants*; and being taxt that his Evidence againſt *Colledge* agreed not with what he had formerly ſaid, *he ſaid, he could not excuſe it, but his poverty and ſelf preſervation drove him to it*? which was a plain Confeſſion of the falſhood of his Evidence, and of the reaſon of it; and added, it was a Judgment upon the King or People, the *Iriſh*-mens ſwearing againſt them, for outing the *Iriſh* of their Eſtates? which can have no other ſence, than the *Iriſh*-mens forſwearing themſelves againſt the *Engliſh* was a Judgment, &c.

How could *Turbervile* be believed in any part of his Evidence againſt *Colledge*, when *Oates* teſtified againſt him, that he ſaid a little before the Witneſſes were ſworn againſt *Colledge* at the *Old-bayly*, that he was not a Witneſs againſt him, nor could give any Evidence againſt him? and yet afterwards at *Oxon*, *Turbervile* told him he had ſworn againſt *Colledge* to the Grand Jury, and ſaid the Proteſtant Citizens had deſerted him, and *God damn him he would not ſtarve*? which words I think need no explanation.

And laſtly, how could *Smith* be believed in any part of his Evidence againſt the Priſoner, when it was teſtified againſt him by *Blake*, that he ſaid *Haynes* his diſcovery was a Sham-Plot, a Meal-Tub-Plot? The meaning of the words I think are well known. That he would have had *Bolron* ſwear againſt Sir *John Brooks*, the Lord *Shaftesbury*, and *Colledge*, things of which he knew nothing, and told him what he ſhould ſwear, leſt they ſhould diſagree in their Evidence? When it was teſtified againſt him by *Oates*, that he ſaid *God damn him* he would have *Colledge*'s Blood? when it was teſtified againſt him by *Mowbray*, that he tempted *Mowbray* to be a Witneſs againſt *Colledge* and Sir *John Brooks*,

and

and was very inquiſitive to know what diſcourſe he had with the Lord *Fairfax*, Sir *John Hewly*, and Mr. *Stern* on the Road to *Oxon*, and ſaid, if the Parliament did not give the King Money, and ſtood on the Bill of Excluſion, that was pretence enough to ſwear a deſign to ſecure the King at *Oxon*? when *Everard*, and many others teſtified he ſaid he knew of no *Preſbyterian* or *Proteſtant Plot*? Now if *Colledge* his Witneſſes were credited, it was impoſſible the King's Witneſſes could be credited, that was agreed by the Court to be true upon the Tryal; the anſwer on the Tryal was, that the King's Witneſſes were on their Oaths, the Priſoners were not; which was a Reaſon but in words and not in ſence.

And ſurely what *Colledge* ſaid on that matter, without any knowledge in the Law, cannot be anſwered. *It is not fair dealing*, ſaid he, *with a man for his life, becauſe the Witneſſes againſt him upon their Oaths deny the things the Witneſſes for him prove, therefore the Witneſſes againſt him muſt be believed, and the Witneſſes for him diſbelieved, when yet the Witneſſes for him were ready on their Oaths to maintain what they ſaid for him.*

Nor is the Law ſo; for taking the Law to be that a Witneſs for the Priſoner ſhall not be ſworn, which is only made good by practice; the ſame Law, that is to ſay practice, is, that a Witneſs without Oath for the Priſoner, is of equal Credit with the Witneſs againſt him upon Oath, and none can ſhew the contrary till of late days.

To give one Example of many, where it was neceſſary for the Priſoner to produce a Witneſs to prove his Innocency, and where the Witneſs for him was as much believed as the Witneſs againſt him. There was a perſon, whoſe name I do not remember, was arraigned (at the ſame time an Indictment of High Treaſon was endeavoured to be found againſt the Lord *Shaftesbury*) for robbing another of Money and of an hired Horſe, of which likewiſe the perſon was robbed; the robbing of the Money and an Horſe was proved by himſelf and ſeveral others, but that the Priſoner was the perſon that committed the Robbery, none poſitively ſwore, but the perſon robbed, who likewiſe ſwore, that the Horſe on which the Priſoner was taken, was the Horſe taken from him; againſt which the Priſoner proved by the perſon of whom the Horſe was agreed to be hired, that the Horſe the Priſoner was taken upon was not the Horſe he let to hire to the perſon robbed; whereupon the Priſoner was acquitted; and yet the Priſoner's Witneſs was not on his Oath, and the perſon robbed was on his Oath; which, beſides that it proves the Matter for which it is brought, ſhews the Folly as well as injuſtice of the practice of impriſoning men without letting them know for what, and without confronting them with the Witneſſes againſt them, upon the Commitment. For how could this man have known what Witneſſes to produce, unleſs he had known what in particular he was Indicted for? and how could he have ſent to ſuch Witneſſes, unleſs he had had the liberty of

ſending

ſending to the perſons who were to be Witneſſes for him; and it ſhews the folly of thoſe ſayings, that a mans Innocence muſt defend him, and that the Evidence againſt the Priſoner muſt be as clear as the Sun at noon day: All will agree that the Priſoner in this caſe was innocent, and yet that alone, without producing a Witneſs to prove his innocence, would have ſtood him but in little ſtead; and how could he have known what ſort of Evidence to have ready, unleſs he knew what he was accuſed of?

I do not mean what Crime he was accuſed of, as Treaſon, Murder, Robbery, Theft, or any other Crime, but unleſs he knew the Perſon robbed, when, where, and other Circumſtances; which, ſay ſome, is not to be permitted in Proſecutions of High Treaſon; for if ſo, then no man ſhall be hanged for High Treaſon, unleſs there was as ſtrong proof againſt him, as is required in an Indictment of any other Capital Matter; and that, they ſay, is not to be expected in Treaſon, for no man will call two Witneſſes to be Evidences of his Words or Actions, being Overt Acts of his Deſign of High Treaſon. The Objection is too fooliſh to be anſwered: For it is neither better nor worſe, than that if a man ſhall not be hanged for Treaſon without Evidence, he ſhall never be hanged for Treaſon; for no Evidence, and Evidence which the Law rejects, is the ſame in Senſe, tho' different in words; and as the intent of the mind is difficult to prove on part of the King, ſo is the Priſoner's part of producing counter Evidence much more difficult; and therefore the Law hath taken care by the Statute of *Edward* the 3*d.* that the Intent ſhall be proved by an Overt Act; and by the Statute of *Edward* the *6th.* that that Overt Act ſhall be proved by two Witneſſes. And therefore, ſince the Law hath taken care that there ſhall be a ſtricter proof in High Treaſon, than in any other Crime, for the Judges to ſay a leſs proof may be admitted to convict one of High Treaſon, than of any other Crime, is very ridiculous, unleſs they will at the ſame time ſay, that the Parliament who made thoſe Statutes, were men of little underſtanding, and not to be regarded. And certainly it was a good Counter-Evidence, which was given in behalf of the Priſoner by ſome Witneſſes, though ſlighted by the Court, and not permitted by the Court to be given by others, that there were great endeavours to ſet up Sham-Plots, and charge the *Proteſtants* with them: For let any one ſhew me a Reaſon, why the Evidence of Sham-plots, though they do not immediately concern the *Priſoner*, is not as good Evidence for him, as the Evidence of a Real Plot, in which he was not concerned, is againſt him. The laſt was permitted to be given in Evidence againſt my Lord *Ruſſel*, Collonel *Sidney*, and others; tho the firſt was not permitted to many Witneſſes in this Tryal, and it was a material Objection which *Colledge* made, *That there was no proof of any Perſons being concerned with him in the Deſign of ſeizing the King.*

It

It was an unadviſed anſwer the Court gave, that he alone might be ſo vain as to deſign it alone; for if from thence an inference is made, as was inſinuated by the Court to the Jury, that therefore he did alone deſign it, it was an Evidence of his being a Mad-man, not a Traytor; had the Evidence been of the miſchiefing the King by means which a ſingle perſon is capable of uſing, as Stabbing, Shooting, and the like, the matter is not impoſſible; but it being by means which it was impoſſible for a ſingle perſon to execute, it carries ſuch disbelief with it, that it is impoſſible to find a man in his Sences at the ſame time guilty of it: And a man that is *non compos mentis*, if my Lords *Coke* and *Hales* are to be believed, cannot be guilty of High Treaſon within that Branch of the Statute, *Compaſſing, and imagining*, &c.

It is true, a mad man may be guilty of Treaſon, in atempting the King's Perſon; but for that he is no more ſaid to be puniſhed, than Beaſts of prey are when killed; which are more properly ſaid to be deſtroyed than puniſhed for the publick good. But if ſo good a Counter-proof in *Colledge*'s Caſe was not made, as ought to have been, ſome allowances ought to be made for the Priſoner's ignorance of what he was accuſed of, his uſage and ſtrict Impriſonment before his Tryal, the ruffling him juſt before his Tryal in the manner before declared, the depriving him of his Notes, the giving an Evidence of many hours long againſt him, before he was permitted to anſwer any part of it. And the uſe of Pen, Ink, and paper, was but of little advantage to him; for a man that hath not been uſed to do it, cannot take notes of any uſe. And in truth, he complained he had not taken notes of half ſaid, but relyed on the Court to do him Juſtice in ſumming up the Evidences, which they promiſed to do, but broke their words.

It muſt likewiſe be conſidered, that the concern a man hath upon him, when he is upon Tryal for his Life, it is ſo far from fortifying that it weakens his Memory. Beſides, the foul practice, without any remorſe, put upon him and his Witneſſes; ſome of them impriſoned, that he could not have them at the Tryal; others ſo threatned, that they durſt not appear for him, and the cry of the auditory againſt him and his Witneſſes, were mighty diſcouragements. All theſe things being conſidered, how could any underſtanding Jury take it on their Oaths, *That the Evidence againſt the Priſoner, of a Deſign to ſeize the King*, &c. *was as clear as the Sun at noon day?*

As for the Evidence which Mr. *Maſters* gave, if it were true, it was no Evidence of Treaſon; an Erroneous Opinion may make an Heretick, but not a Traytor; it is a very diſtant Conſequence, that becauſe he affirmed that the Parliament in 40 had done nothing but what was juſt in reſpect of King *Charles* the Firſt, therefore the Priſoner was guilty of a Deſign againſt King *Charles* the Second; beſides that in all probability, tho' Mr. *Maſters* might in-

veigh againſt the Parliament, *Colledge* might only juſtifie them, by throwing the ill things done in that time upon the Papiſts, as *Colledge* in his Defence ſays; and Mr. *Maſters*, after much pumping, recollected himſelf, and ſaid he thought the Priſoner ſaid, the Papiſts had a hand in thoſe things; which proved the truth of *Colledge's* Aſſertion.

As for the Evidence of *Colledge's* ſaying he might be a Collonel in time; if he hoped for what he ſaid, it was no Crime, or proof of a Crime, 'tis no more than what every private Soldier hopes for, and he himſelf had been one.

As for the Evidence of *Atterbury*, *Sawel*, and *Stevens*, of their ſeiſing the Pictures; admit they ſwore true, it did not amount to the proof of the Treaſon in the Indictment, or of any ſort of Treaſon: And yet if *Colledge's* Maid ſaid true, it looks as if the finders or ſome other perſon ſent them to *Colledge's* Houſe, in order to find them there.

Of all ſorts of Evidences, the finding Papers in a perſons poſſeſſion is the weakeſt, becauſe no perſon can ſecure himſelf againſt deſigns upon him in that kind. And after *Dangerfield's* Deſign upon Collonel *Manſell*, and the Evidence in *Fitzharris* his Tryal, that the Deſign of that Pamphlet was to convey Copies of it to ſome Members of Parliament's pockets, and then ſeize them, that piece of Evidence ought to have been ſpared, till thoſe and other practices of like kind had been forgotten.

The laſt Witneſs was Sir *William Jennings*, of *Colledge's* ſaying he had loſt the firſt blood in the Cauſe, but it would not be long before more would be loſt; what was that more, than that he thought more would be loſt in the Cauſe, which he interpreted the Proteſtant Cauſe? Suppoſe he thought ſo without reaſon, and was miſtaken, where was the Crime? But if he thought ſo upon good reaſon, and good reaſon he had to think ſo, there was no pretence of a Crime in it. I believe moſt men thought as *Colledge* did, from the time of the buſineſs of *Fitzharris*, and what imputation was it to him? Why were not all the expreſſions he uſed in his Tryal as good Evidence againſt him as that ſaying? For he then ſaid, *it was an horrid Conſpiracy to take away his Life, and would not ſtop at him, for it was againſt all the Proteſtants of England*, and the like; which was his Opinion, and after times ſhewed him a true Prophet.

One thing was very diſhoneſtly inſinuated, that the Priſoner was a *Papiſt*, which was only to incenſe the Jury againſt him, and it had its effect; whereas it was very plain that he was a *Proteſtant*, tho' perhaps a Diſſenter, and therefore had not lately come to the publick

publick Church; and under that notion the *Papiſts* and ſome *Proteſtants*, were contented that Diſſenters ſhould be puniſhed as *Papiſts*; yet if they could have proved him a *Papiſt*, no doubt of it they would have done it; for the deſtruction of the man was the deſign of the Proſecution, and it mattered not for what Treaſon he was convicted, ſo he was convicted; and he himſelf gave a pretty ſort of Evidence againſt himſelf, if they could have proved him a *Papiſt*. He proved, and confeſſed, he was Educated a *Proteſtant*; and if they could have proved him reconciled to the *Popiſh* Religion, which was Treaſon, he helpt them a great deal in their proofs: It was therefore very diſingenious in the Chief Juſtice to reproach him at his Condemnation, that he had not made that proof of his Religion as it was expected, when his Religion was not the matter of which he was Indicted; that was ſlily inſinuated to exaſperate, and no proof pretended to be made of his being a *Papiſt*: But he had more reaſon to complain of the injuſtice of the Court in ſumming up the Evidence, who did it in ſuch a manner, that if they had been Counſel for the Priſoner, as they pretended, they would have been juſtly ſuſpected to have taken a Fee of the other ſide to betray their Clyent.

For, as *Colledge* readily ſaid, if the Chief Juſtice had looked on his Notes, he would have found more Evidence againſt *Turbervile* and *Dugdale* than he had repeated. And it was a lame excuſe for the Chief Juſtice to ſay, he referred it to the memory of the Jury, for he could not remember more; whenas I dare ſay, after about thirteen hours Evidence, the Jury remembred no more than that they were to find him Guilty.

The truth is, upon the whole, what *Colledge* ſaid was true; they took away all helps from him for defending himſelf, and therefore they had as good have condemned him without a Tryal. Notwithſtanding all which, the courage of the Man never fainted, but after he was condemned, boldly asked *when he was to be Executed*? To which the Lord Chief Juſtice replied, it depended on the King's Pleaſure; but ſmoothly ſaid, in thoſe Caſes of High Treaſon they did not uſe to precipitate the Execution, it ſhould not be ſo ſudden but that he ſhould have notice to prepare himſelf. And in truth he had from the eighteenth, on which he was condemned, to prepare himſelf, to the one and thirtieth of *Auguſt* 1681. on which he was Executed; a much longer time than was allowed my Lord *Ruſſel*, or Mr. *Corniſh*, and many others. And the true reaſon of ſo long a Reprieve, was to ſee how the Nation would digeſt the matter, and to ſee whether the man by the terror of Death could be prevailed upon to become a Tool for to deſtroy other Innocents; but when it was found that the people were quiet, and that the Priſoner could not be prevailed upon to do an ill thing to ſave his life, his Execution was ordered; yet, as a ſhew of mercy, his Quarters

were

were permitted to be buried; a favour he ſlighted, with ſaying that he cared not whether he was eaten up with Flyes or Worms. The ſame favour was likewiſe ſhewed *Fitzharris*, but the true reaſon of both was, that they had a mind that the Tryals and pretended Crimes, for which *Fitzharris* and *Colledge* were condemned ſhould be forgotten; which would not be ſo ſoon done, if their Quarters were alwaies expoſed to view. But tho' all people were quiet, yet there was great grumbling, and moſt honeſt men were afraid; and the conſtancy of *Colledge* at his Execution was ſuch, that it made the moſt violent againſt him relent.

REMARKS

REMARKS
ON THE
Earl of Shaftsbury's GRAND-JURY.

THE next Perſon queſtioned was the Earl of *Shaftsbury* againſt whom a Bill of High-Treaſon was preferred to the *Grand Jury*, at the Seſſions Houſe on the 24*th* Day of *November* 1681: The Evidence was publickly given in Court and was this. Mr. *Blathwaite* ſwore he found the Papers then produced in a Velvet Bag in the great Trunk, which was taken by Mr. *Gwnnye* in the Lord *Shaftsbury's* Houſe. Mr. *Gwynne* ſwore, All the Papers in the Velvet Bag when he delivered them to Mr. *Blathwaite* were taken by him in the Lord *Shaftsbury's* Houſe; Sir *Leoline Jenkins* ſwore the Paper produced was the Paper delivered him by Mr. *Blathwaite* and it was unaltered; then the Paper was read, the Effect of which was a project of an *Aſſociation* ſigned by no Perſon, and whoſe Hand Writing it was none knew; *John Booth* ſwore, that he was engaged to Captain *Wilkinſon*, who pretended to have a Commiſſion from the Lord *Shaftsbury* and ſeveral others to go for *Carolina*, he was about that time introduced into the Earls acquaintance by the Captain, where was a diſcourſe about *Carolina* buſineſs, he was four or five times between *Chriſtmas* and *March*, with the Earl and the Captain, that the Captain told him he was to Command Fifty Men to be the Earls Guard at *Oxon*, and would have had him to be One, That if the King did not Conſent to ſeveral *Acts* of *Parliament* and other things they were to Purge the *Guards* and *Court* of ſeveral Perſons, and tho' the Captain told him that firſt, yet afterwards he heard the *Earl* ſay the ſame things, particularly about a week or ten days before the Parliament ſate at *Oxon*, he gave ſome Intimation of this to *Walter Banes*, and then Writ it down, and ſent it to the Counſel Sealed in a Cover. *Turbervile* ſwore, that the Lord *Shaftsbury* ſaid about *February*, there was but little good to be done with the King as long as his Guards were about him. *Smith* teſtified a great deal of diſcourſe between him and the Lord *Shaftsbury* of ſomething ſaid Reflecting on the *King*, and that he ſhould ſay that if the King ſhould offer any violence to the

Parliament at *Oxford*, he would meet with a ſtrong Oppoſition for that the Gentlemen, who came out of the Country, came well provided with Horſe and Arms to Oppoſe, and that they might Lawfully do it, if he offered any Violence to them, whilſt they ſate. *Haynes* ſwore, that the Earl ſaid if the King did not give *Haynes* his Pardon, he and others would raiſe the Kingdom againſt him, that *Haynes* gave the Earl an exact Account of Tranſactions ſince King *Charles* the *Firſt's* coming to the Crown, and that the Earl ſaid the Duke of *Buckingham* had as much Right to the Crown as any *Stewart* in *England*. *John Macnamarra* ſaid, the Earl ſaid, the King was *Popiſhly* Affected and took the ſame Methods his Father did, which brought his Fathers Head to the Block, and they would bring his thither, and this was ſaid in the preſence of *Ivey*, and he thought of his Brother, and ſaid the King deſerved to be depoſed as much as King *Richard* the *Second*. *Dennis Macnamarra* likewiſe teſtified the laſt words, and that it was the latter end of *March* or beginning of *April*, *Ivey* ſaid, the Earl ſaid, if the King denyed *Haynes* a Pardon they would riſe upon him and force him to give one, and that they deſign'd to depoſe him and ſet up another in his ſtead. *Bernard Dennis* ſaid, he had a great deal of diſcourſe with the Earl who bid him ſpeak to his Friends in *Ireland* to be in a readineſs to Aſſiſt the Commonwealth of *England*; for they intended to have *England* under a Commonwealth and Extirpate the King and his Family.

Then the Court told the Jury the Indictment was grounded on the Statute of King *Charles* the *Second*, but they ought to conſider of that Statute as alſo the 25*th* of *Edward* the *Third*.

The queſtion is, whether the *Grand Jury* ought to have found the Bill on this Evidence, firſt it ought to be conſidered, what the Duty of a *Grand Jury* is, and I think it is not what the *Chief Juſtice* ſaid, to conſider only whether there be probable ground for the King to call the Perſon Accuſed to an Account, much leſs do I think that the reaſon of the finding of a Bill by the *Grand Jury* was for the Honour of the King, or Decency of the Matter, leaſt Perſons Accuſed ſhould be called to an Account by the King, where there is no kind of Suſpition of the Crime Committed by them, as the Court ſaid (which laſt Matter was never aſſigned as a Reaſon of finding a Bill by the *Grand Jury* before) but I take the Reaſon of a *Grand Jury* to be this, that no Man for a Capital Matter ſhall ever be *queſtioned by the King*, unleſs a *Grand Jury* take it on their Oaths that they believe the Matter of the accuſation is true, I do put an Emphaſis on the words *queſtioned by the King*.

It is true, it is generally ſaid, That the buſineſs of a *Grand-Jury*, in capital Matters, is *in favorem vitæ*, but that taken ſimply is not true, for then what reaſon can be aſſigned, why a Man ſhall be Arraigned on an Appeal of Murder, Robbery or the like, which

which touches his Life, as much as an Indictment of those Crimes, without having the Matter of the Appeal first found to be true by a *Grand Jury*; but the true reason of a *Grand Jury* is the vast inequality of the *Plaintiff* and *Defendant*, which in an Indictment is always between the King and his Subjects, and that doth not hold in an Appeal, which is always between *Subject* and *Subject*, and therefore the Law in an Indictment, hath given a Privilege to the Defendant, which it hath done in no other Prosecution, of purpose, if it were possible, to make them equal in the Prosecutions and Defence; that equal Justice may be done between both. It considers the *Judges*, *Witnesses* and *Jury* are more likely to be influenc'd by the King than the Defendant; the *Judges* as having been made by him, and as it is in his Power to turn them out, punish, to prefer or reward them higher, and though there are not just Causes for them to strain the Law; yet they are such Causes, which in all Ages have taken place, and probably always will, this was the reason of running *Prerogative* so high in their Judgment of *High Treason* before the *Stat.* of *Ed.* III. That no Man, as that Statute says, knew what was not *High Treason*; This was the reason of expounding that *Statute* oftentimes between the making of it, and the making the Statute of Queen *Mary*, that People was at as great a Loss, till the last Statute as they were before the making of the first, and even since the Statute of Queen *Mary*, the Exposition on the Statute of *Ed.* III. hath been so extravagant and various, that People are at this day as much at a Loss to know what is not *High Treason*, as they were before the Statue of *Ed.* III. nor was it, nor is it, possible, that the great Power of enriching, honouring, rewarding and punishing lodged in the King, but that it always had, and yet must have, an influence on the *Witnesses* and *Jury*; and therefore it is that the Law hath ordered, that at the King's Prosecution no Man shall be criminally questioned, unless a *Grand Jury*, upon their own Knowledg, or upon the Evidence given them, shall give a Verdict, that they really believe the Accusation is true.

I own of late days, They have said the Duty of the *Grand Jury* is to find, whether the Accusation is probable, but that saying is warranted by no positive Law, or antient Authority; and therefore the Duty of the *Grand Jury* must be founded in the *Oath* administred to them, which is as strict as the *Oath* administred to the *Petit Jury*; and to say Truth, the Verdict of the *Petit Jury* takes credit from the Verdict of the *Grand Jury*, which is not only the reason of the difference in the Names of the two Juries; but is likewise the reason, why an Attaint for a false Verdict doth not lye against a *Petit Jury*.

The Oath of the Grand Jury is, *To present the Truth, the whole Truth, and nothing but the Truth*: The Oath of the *Petit* Jury is, *Well and truly to try, and true Deliverance make, between the King,*

and

and the Priſoner at the Bar, &c. which ſignifies the ſame thing as to preſent the Truth, *&c.* it is true, ſome reaſons have been offered, which if conſidered, are Words without Sence; As that the Preſentment of the *Grand Jury* is but in order to bring the Priſoner to his Tryal, and he is not before the *Grand Jury* to make his Defence himſelf; but that can be no reaſon why Probabilities ſhould ſatisfy the Jury, becauſe it doth not anſwer the deſign of the Law, which will have a Man convicted by the poſitive Oaths of *Two Juries*, conſiſting of more than twenty four, in all Endictments.

Next why is a *Grand Jury* compoſed of more ſubſtantial and underſtanding Men than a *Petit Jury*, if their buſineſs be mere Formality, or a Matter of leſs weight than the buſineſs of a *Petit Jury*: In the laſt Place, why is leſs Evidence requir'd to convict a Man in his abſence than is requir'd to convict him if preſent; it ſeems to me ſo far from an Argument, that leſs Evidence is requir'd to convict one, if abſent, than if preſent, that it ſeems to me, that more Evidence ſhould be required to do it. Men may, and often do, make very fair Stories in the abſence of a Perſon accuſed, that when preſent, he eaſily anſwers; and there being no poſitive Law for the Direction of a *Grand Jury* in that Matter, a *Grand Juryman* is excuſable, nay it is his Duty, to give a Verdict according to the plain Underſtanding of the Words of his Oath, which is to preſent the Truth, as far as he is convict of it, and that Truth muſt be found according to his knowledg, or as it is repreſented to him by Witneſſes.

And as for the Witneſſes, they muſt be Perſons of credit, and all Perſons are ſuppoſed to be ſo, unleſs the *Grand Jury* know the contrary, or have been ſo credibly informed; 'tis true a *Grand Jury* ought not to believe *Coffee houſe* Stories, or light Stories, but common Fame by credible Perſons, which is *vox Populi* ought to prejudice them againſt a Witneſs, ſo as to disbelieve him, and it is no Anſwer to ſay, as the *Chief Juſtice* in this Caſe ſaid, That the credibility of the Witneſs is not to be conſidered by the *Grand Jury*, becauſe the King is not preſent to defend the credit of his Witneſs (tho the Fact in that Caſe was not true, for the Kings Attorney, Sollicitor and Counſel were preſent, and I think the King is no otherwiſe preſent at any Criminal Proſecution, and the Jury knew by *Colledge*'s Tryal and by *Wilkinſon*'s Depoſitions before the King that the Evidence of all the Witneſſes produced except what were to the Paper was queſtioned, but even that was afterwards quitted by the Court when it would not be ſwallowed by the *Grand Jury*; for afterwards the Court told them that if they, of their own Knowledg, knew any thing againſt the Witneſſes, they might conſider of it, but not of what they were credibly informed of by others, and beſides the credibility of the Witneſſes, the Poſſibility or Probabiliiy of the thing ſworn is to be conſider'd by the *Grand Jury*, an impoſſible thing

thing they ought not to believe, tho' ſworn by never ſo many credible Witneſſes, and a very improbable thing they cannot poſitively on their Oaths ſwear they believe.

And not only the Fact, but what the Crime of the Fact alledged in the Bill of Endictment, the *Grand Jury* as far as they are capable of judging Matter of Law ought to conſider; ſo they were told in the charge given them; it is true if they were Ignorant in the Law and the Court in their directions miſled them, as if the Court ſhould tell them ſtealing an Horſe is High Treaſon, and the *Grand Jury* find it accordingly, it is excuſable in the *Grand Jury*, though puniſhable in the Court; but wrong directions by the Court in the finding a Fact, where there is no Evidence doth not excuſe the *Jury*. Now to examine the Matter in hand by theſe Rules, could any Perſon who knew my Lord *Shaftsbury*, or that had heard of, or believed his Character to be what it was, believe that it was poſſible for him to diſcourſe with the Witneſſes, at the rate they ſwore; to ſome of them at the firſt, to others of them the ſecond time, he ſaw them; to diſcourſe of Matters of pollicy, with *Booth* at one time, and afterwards with *Haynes*, and afterwards with *Macnamarra*, Fellows of ſo little Sence, that he would have been aſhamed to have entertained them in the meaneſt Office about him, and yet as they pretended makes them his Privadoes in the ſecret, of not ſo much what he would have had them, but of what he intended himſelf, to do.

Who could believe any thing, *Turberville*, *Smith* or *Haines* ſhould ſay where there was ſo much of their falſhoods and of their deſigns to ſwear falſly proved againſt them in *Colledge's* Trial, or of *Ivey* and the three *Macnamarra's* after that Tryal, who tho' they were not produced at it, becauſe the Kings Council by *Colledge's* Notes, ſaw he was able to falſify them, yet ſome Witneſſes in that Tryal proved their deſign of ſwearing falſly.

Who could believe *Booth's* ſtory of Liſting ſo many Men under *Wilkinſon*, to be at my Lord *Shaftsbury's* diſpoſe at *Oxon*, after *Colledge's* Tryal, and after what *Wilkinſon* had teſtified to the King and Council, though not then proved to the *Grand Jury*.

A Judg indeed cannot take notice of any thing not proved (though he may and ought to be a Witneſs, if he knew any thing material of the Matter tryed before him and others) but a *Grand Jury* may take notice of any thing they know or believe. The Paſſages at *Colledge's* Tryal were pretty notorious, being authentically publiſhed by *Fra. North*; and the Examination of *Wilkinſon* by as authentic a Paper.

It was unaccountable, that the Witneſſes conceal'd what they heard the Earl ſpeak ſo long, of which none of them pretended to give any reaſon, nor was it any excuſe to thoſe who ſigned a

Petition to the City, in which they ſuggeſted, they were tempted to ſwear againſt their Conſciences, to ſay they knew not what was in the Petition, he that ſets his hand to a thing, as if he aſſented to it, but doth not, is a Man of Falſhood. Suppoſe one ſets his hand to a Bond, ſaid to be ſealed and delivered, not having ſeen it Seal'd and deliver'd, is not he guilty of little leſs than *Forgery*; but admitting thoſe Witneſſes had ſworn Truth, yet the Jury ought not to have found the Bill; for they ought to find the Bill true according to all the material Circumſtances of it, as well as the Subſtance of it, which was *High Treaſon*; one material Circumſtance of it was, that it was ſaid to be *High Treaſon*, within the Statute of *Car.* II. and that made another Circumſtance of the Indictment material, which was the time when that Treaſon was committed; becauſe by that Statute the Proſecutions of Treaſons on that Statute ought to be within ſix Months after it is committed, and the Indictment ought to be within three months after the Proſecution; and he being impriſoned in *July*, and the Bill ſuggeſted, that the ſuppoſed Treaſon was committed the 18*th.* of *March* before, and divers other times both before and after, which might be interpreted to have been after the Priſoners Commitment, had the Jury found the Bill as laid, they had found the Treaſon to have been committed not only within the time the *Proſecution* by that Statute ought to be, but alſo within the time the *Indictment* ought to have been preferred; whereas in truth, the Earl had been Impriſon'd above three months before the *Indictment* preferred, and there was no Evidence of any Treaſon committed by him after his Impriſonment; and therefore the finding the Bill as laid had been injurious to bring a Man in queſtion for his Life on that Statute, whereas by Law he ought not to have been.

For it was reſolved in *Colledge*'s Caſe, that the Proſecution for Treaſon on that Statute ought to be within Six Months, and the Indictment to be within three Months, tho the Court was of another Opinion in the Lord *Ruſſel*'s Tryal.

And that this Indictment was on that Statute was expreſly ſaid to the *Grand Jury*, and upon good reaſon; for the Court in their Charge ſaid, that the Intention of levying War, or deſigning to Impriſon the King, was not Treaſon, till the Statute of *Charles* the *Second*; tho' in the Lord *Ruſſel*'s Tryal, it was held to be Treaſon by the Statute of *E.* 3. and therefore the *Time* of the *Treaſon* committed was material to be found by the *Jury*.

As for the Writing found in the Earls Study it was no manner of Evidence of Treaſon, admitting what the Witneſſes ſwore, as to the finding it to be true; becauſe it was not proved that it was Proſecuted or Compoſed by the Earl of *Shaftsbury*, or by his Order, and that Peice of Evidence was in that Particular, a meer Original.

In *Fitz-Harris* his Caſe, it was proved the Libel was Compoſed by his direction, *Coll. Sydney*'s Book was proved to be like his Hand, it was pretended that *Colledge* ſaid he was the Author of the *Raree-ſhow*, and no example of this Evidence was ever made uſe of before.

Neither was it evidence of Treaſon as to the Matter, for there was not one word againſt the preſent King, but his Succeſſor, if it ſhould be ſuch a Perſon.

It is true, one of the Kings Counſel ſaid that one paſſage in it, was that they would join to deſtroy the Mercenary Forces about *London*, and thence inferred it was down right levying War, againſt the King and his Guards, whereas there is not any ſuch word or thing in the Paper, as he pretended to cite, and if they had been in the Paper, they would have been but Evidence of a Treaſon within the Statute of the late King, and then the time of Writing them, ought to have appeared, and if that had been cleared, yet for the above Reaſons it was no Evidence, and the *Grand Jury*, tho' ſome of them afterwards ſmarted for it upon other pretences, did like honeſt underſtanding Gentlemen, and had they done otherwiſe to avoid the Ignominy of being called, tho' in truth it was an honour to be an *Ignoramus Jury*, they had juſtly deſerved the reproach, which ſince have lighted on other Juries; ſuch as Mr. *Corniſh*'s, and the like, and having ſpoken of this *Ignoramus Jury*, for which two of them, if not more, were afterwards upon other pretences ſeverely handled; I think fit to ſay ſomething of the Sufferings of one, for being in a preceding *Ignoramus Jury*, becauſe it was a meer Novelty, and that was Mr. *Wilmore*.

RE-

REMARKS

ON

Mr. Wilmore's

HOMINE REPLEGIANDO.

HIS Profecution tho it was but Criminal and not Capital did as much miſcheif, as it ſtruck a terror into all *Grand Juries*, as any the before mentioned Matters; and it was by the *homine replegiando* iſſued out againſt him. As for the Information againſt him I ſhall ſay nothing, becauſe the injuſtice of both will appear in the diſcourſe of the firſt, Mr. *Wilmore* had ſent a Boy beyond Sea by agreement, as Mr. *Wilmore* ſaid, whether true or not, as to this Matter is not material, a *homine replegiando* is granted againſt Mr. *Wilmore* for this, at whoſe Proſecution is not material; for any Perſon upon ſuggeſtion back'd by an *Affidavit* may have it granted, the *Sheriff* would have returned on the Writ, that the Boy was ſent by his own agreement and conſent with Mr. *Wilmore*, which return was not allowed, and the Sheriffs were told that they muſt either return they had replevied the Boy, and they muſt have him in Court, or elſe they would be laid by the heels, or elſe they muſt return that Mr. *Wilmore* had *Eſloigned* him, which is carrying him away, where the Sheriff could not find him, and then a *Withernam* would iſſue againſt Mr. *Wilmore*, upon which he would be taken and kept in Priſon, till he produced the Boy, and no other return ſhould be allowed then one of thoſe two, and if they did not make one of thoſe two Returns they ſhould be Committed, and if the Law be ſo, the Court were innocent, but the Law ought then to be reformed in that Particular; but if the Law was not ſo, as I think it is not, I think Mr. *Wilmore* and the Nation had great injuſtice done them; for it was quickly ſeen what the miſcheif of that Judgment was, and therefore it was endeavoured to be reformed by an Act of King and Counſel afterwards; firſt I ſay, it is lawful for a Maſter to Covenant with a Servant to ſerve him beyond Sea, in the next place it is lawful for a Maſter to ſend his Servant beyond Sea according to ſuch agreement, and if both thoſe Propoſitions be true, as I think no Man will ſay they are not, it is a natural conſequence to ſay, that the Law hath provide

provided a Return upon a Writ of *homine replegiando*, if it ſhould be ſued out againſt ſuch Maſter for a Servant ſo ſent beyond Sea, which may indempnify the Maſter in ſo doing, and that Return can be no other then the ſpecial Matter, which in this Caſe was refuſed to be accepted; 'tis no argument that no ſuch Return is ever read of in any Book; For the Law hath determined, that ſome Returns are good and others are bad, yet it hath not ſaid, what are all the good Returns, which may be made on an *homine replegiando*, and the Sheriff is no more confined to Returns than a Man is in the Pleading of his Caſe, which my Lord *Coke* ſays may vary, according to the Nature of his Caſe, and yet the Law hath ſaid what is a good Plea, and what a bad one, but hath not expreſt all the good or bad Pleas; and therefore it is no argument againſt ſuch a Return, that no preſident of it can be found, 'tis enough that no judgment can be produced againſt it, and the reaſon of both may be, that the Caſe never happened before, that is to ſay, that never any Perſon was ſo malitious before, as to ſue out an *homine replegiando* againſt a Maſter for a Servant ſent by agreement beyond Sea, and Returns muſt be varyed according to the Caſe, perhaps no Preſident can be found of a Return on that Writ, that the Perſon ſought for is dead; yet all Perſons will agree it is a good Return, it is ſo in a Replevin of Cattle, and even that Example falſifies the Doctrin of the Court, that there is but two Returns on that Writ allowable by Law, it is not an argument for diſallowing the Return, that the Perſon ſent beyond Sea, was a Child not capable of making ſuch a contract, (though I believe if the Matter were look't into he was of Age ſo to do,) for nothing of that doth, or can appear in the Writ or Return; It ſtands therefore ſimply upon this, whether the Sheriff may on an *homine replegiando* return, that the Perſon ſuppoſed to be in cuſtody, being of full Age, was by mutual agreement ſent beyond Sea by the Perſon in whoſe cuſtody by the Writ, he is ſuppoſed to be, which I think is far from a doubt; but notwithſtanding all theſe hardſhips on *Juries*, it was ſeen to be plainly impoſſible to procure any Bills of Indictment for *High Treaſon*, much leſs any Perſons to be convicted on the like Evidence, except in *London*, where are ſome of the beſt, as well as the worſt, Men in the Nation, and even there it was not to be done as long as the *Juries* were ſenſible and honeſt Men, which would be as long as the *Election* of *Sheriffs* was in the Citizens, and to the Honour of the City, it was ſeen that they choſe honeſt Men to be their Sheriffs, and thoſe choſen when they ſaw the Publick Safety depend on honeſt Officers, though at other times they had rather pay a Fine than undergo the trouble and charges of that Office, yet at that time no Man legally choſen refuſed to ſtand, tho' at that time they were reproached and puniſhed for it; and if Mr. *Box* refuſed, it was becauſe he would not joyn with *North*, who was impoſed on the City;

for which reaſon it was reſolved to take from the City, the right of chooſing Sheriffs, but by what means it was not preſently reſolved on.

That the City might forfeit their right of Electing, there was no great doubt, as if the Sheriffs were dead and new ones were not choſen in a convenient time; ſo that there was a defect of Juſtice or the like, they would have forfeited their right, but nothing of that kind could be laid to their charge, therefore a new unheard of Matter was thought on, and ſet a Foot, which was to make the City forfeit their being a Corporation, and being annihilated, the Grants made to them by the Crown, as the right of Electing Sheriffs was, would revert to the Crown again.

A *quo Warranto* was therefore brought againſt the City in *Hillary* Term 1681. to ſhew by what Warrant they pretended to be a Corporation, and to have the Priviledges mentioned in the Writ, to which the City pleaded and ſet forth their right, and the King replyed, and ſet forth ſeveral Matters done by them, contrary to the duty of a Corporation; upon which there was a *Demurrer*, of which Judgment was not given till *Trinity* Term, 1683. I will ſay nothing of the right of the Proceeding, it having been largely and learnedly argued for the City, but if the Matter were ſo clear a Caſe, as the Kings Council and Court would have it to be, how came it to paſs that in *Henry* the Eight his time, when the King was ſo earneſtly bent to diſſolve the religious Corporations, in which the inclination of the Nation joyned with him, the doing it by *quo Warrantoes* was not thought of, it was very plain, that thoſe pretended Religious did not obſerve the Rules, nor perform the Ends for which they were incorporated, and certainly their Miſdemeanours againſt the intent of their being incorporated were better Cauſes of forfeiture than was the Cities Petitioning for a Parliament, *&c.* yet that King took other methods, he had formal Conveyances of their Lands, from moſt of thoſe Corporations, and formal Surrenders of their Corporations ſigned by every individual of the Corporations, and thoſe afterwards confirmed by Act of Parliament, and ſure the Late King had as much right to bring a *Quo Warranto* againſt *Maudling Colledge* for refuſing, contrary to their duty, to admit the Preſident the King nominated; if the King had a right to nominate the Preſident (as ſome Judges aſſerted he had) as King *Charles* the Second had againſt the City, and it was once in debate, whether the Proceeding againſt that *Colledge* ſhould be by *quo Warranto* or before the *Eccleſiaſtical Commiſſioners*; the laſt was reſolved on, not as the more legal or effectual, but as more expeditious. In the one the Proceedings being *de die in diem*, in the other from Term to Term; this only I will obſerve that when the Judgment againſt the City was given, which was of the greateſt concern to the Nation ever conteſted in any Court

of

of *Weſtminſter Hall*, it was done by two Judges only, and no reaſon of that Judgment rendred, whereof *Wythens* who was one, I think, heard but one Argument in the Caſe; it is true they ſaid *Raymond*, when alive, was of the ſame Opinion, and ſaid *Saunders* who was then paſt his Sences was of the ſame Opinion, tho' I was told by one who was preſent when the two Juſtices came to ask his Opinion in the matter, he had then only Sence enough to reproach them for troubling him about the Matter when they were ſenſible he had loſt his memory, and to ſay truth, the delivering the Sence of an abſent Judge, tho' it hath been ſometimes practiced, is not allowable; for ſometimes they deliver another Opinion than what the abſent Judge is of, Judge *Withens* did ſo in ſeveral Caſes, when he delivered the Opinion of Sir *Edward Herbert*, which Sir *Edward Herbert* afterwards in open Court diſowned; Judge *Holloway* ſerved Judge *Powell* the ſame trick, if the laſt ſaid true. The long depending of the *quo Warranto* had Alarum'd all the Nation, who yet were quiet, hoping that Judgment would be given for the City, as ſome of the Judges and of the Kings Councel had given out it would, but the contrary was reſolved on; and therefore the Nation at the time of the giving the Judgment muſt be amuſed with ſomewhat elſe, and with nothing ſo proper as a Plot; but there was difficulty in that alſo: for if the pretended Plotters ſhould be acquitted it would make the matter worſe, and nothing would ſecure that, but impoſing what Sheriffs they pleaſed on the City, and accordingly *North* and *Rich* was pitch't on, the one by a ſhameleſs Trick, and the other by open Force, were impoſed on the City.

Having gained that point the Proceedings in the *quo Warranto* were much quicker then before, and two Arguments only were permitted in it of each ſide, the one in *Hillary* Term, the other in *Eaſter* Term, and ſo the Caſe was ripe for Judgment in *Trinity* Term, following, but muſt be, and was, uſhered in with the Diſcovery of a pretended Plot, which ſo amazed the Nation, that tho' Judgment in the *quo Warranto* was given two days after the pretended Diſcovery, no Body took any notice of it for ſeveral Months after it was given; the Truth was, no body durſt mutter againſt it, or queſtion the Legality of it; it was enough to have brought any Perſon into the Plot to have done it, it would have been called flying in the Face of the Government, queſtioning the Juſtice of the Nation, and ſuch like *Cant*.

REMARKS
ON THE
Lord Ruſſel's Tryal.

THE Plot being noiſed abroad, the Perſons before-hand reſolved on, were ſeized on, and the Lord *Ruſſel* and others were clapt up cloſe Priſoners.

The *Lord Ruſſel* having been for ſome few Weeks a cloſe Priſoner in the *Tower*, was the 13*th*. of *July*, 1683. brought to the *Old-Baily*, and arraigned for High-Treaſon, in deſigning to raiſe a Rebellion, *&c.* and the ſame Morning was tryed; he deſired he might not be tryed that day, for he had ſome Witneſſes which would not be in Town till Night, which being denied, then he deſired that the Tryal might be put off till the Afternoon, which was likewiſe denied, he asked whether he might not make uſe of any Papers he had, which was allowed; he deſired he might have a Copy of the Pannel of the Jury that was to paſs on him, he was told he had a Copy delivered to his Servant ſome days before. The Jury being called, he challenged the Fore-man, for being no Free-holder in *London*, to argue which, Councel were aſſigned him, who preſently came into Court, and having excuſed their not ſpeaking more to the Matter, for want of time to conſider of it, argued that it was a good Challenge, becauſe at Common Law, every Jury-man ought to be a Free-holder; that the Statute of 2. *Hen.* 5. provides none ſhall be a Jury-man in capital Matters, but a Free-holder of forty Shillings yearly; that there is no difference between a City and County, and a County at large at Common Law, nor by that Statute, 7. *Hen.* 7. which takes away the Challenge of no Free-hold in the Ward in *London*, ſhews it was a good Challenge in *London* before that time; the 4*th*. of *Henry* the 8*th*. which likewiſe takes away the Challenge of no Free-hold in *London*, ſhews it was a good Challenge before that time, and the ſame was inferred from the 23*d*. of *Henry* the 8*th*. but though of thoſe Statutes extended to Treaſon, yet if it was a good Challenge in Treaſon in *London* before thoſe Statutes, it was ſo ſtill. The Kings Council ſaid, at Common Law it was not neceſſary that a Jury-man in Treaſon ſhould be a Free-holder, and though Treaſon is within the

2*d*.

2d. *Henry* the 5th. yet by the Statute of Queen *Mary*, the Statute of the 2d. of *Henry* the 5th. as to Treaſon, was repealed, that it was a Point they would not have loſt to the City of *London*, that if the Priſoner ſhould peremptorily challenge thirty five, as by Law he might, there would ſcarce be found thirty five more Free-holders in the City, the Inheritance of the City being moſtly in the Nobility and Corporations, and conſequently Treaſons may be committed in the City, and there would not be enough to try it, and in the Caſe of the City of *Worceſter*, in a *Quo Warranto* brought againſt them, that Challenge was taken and over-ruled by the *Kings-Bench*, by Advice of the Judges of the *Common-Pleas*; that the *Venire* mentions no Free-hold, but only *Probos & Legales Homines de Vicineto*.

Then the Chief Juſtice asked Mr. *Pollexfen*, whether he did find in any Judgment in Treaſon at Common Law, that no Free-hold was a Challenge, who anſwered he did not, whereupon the Chief Juſtice replied, that then he did not ſpeak *ad idem*; for he took it in caſe of Treaſon and Felony, at Common Law it was no Challenge, and the Statute of *Henry* the 5th. in that point was introductive of a new Law, and that Statute as to Treaſon, was repealed by that of Queen *Mary*, and that a Caſe cannot be found of ſuch a Challenge in Treaſon, ſince the Statute of Queen *Mary*, but it was a buſineſs of great Importance.

The Chief Baron was of the ſame Opinion; for the ſame reaſon Juſtice *Windham* and Juſtice *Jones* were of the ſame Opinion, the laſt added the rather, becauſe the Priſoner is allowed to challenge thirty five peremptorily; and Juſtice *Charlton* was of the ſame Opinion, and the rather, becauſe no Preſident had been offered of ſuch a Challenge before. Juſtice *Levins* was of the ſame Opinion, for the ſame Reaſons: Juſtice *Street* was of the ſame Opinion, for the ſame Reaſons, and thought they had been very nice, when the Life of the King lay at ſtake, and all the Cuſtoms and Priviledges of the City of *London* ſeemed to be levelled at in that Point: Juſtice *Withins* was of the ſame Opinion.

Then the Chief Juſtice told the Priſoner the Court over-ruled his Challenge, but that he had no Hardſhip put upon him, for the Reaſon of Law for Free-holders, was that no ſlight Perſons ſhould be put upon the Jury, but in his Caſe there were Perſons of Quality and Subſtance put upon the Jury, which was the ſame in ſubſtance with a Jury of Free-holders.

Theſe being the Reaſons of over-ruling that Challenge, they may be ranked under theſe Heads, there was no ſuch Challenge at Common Law, if there were, yet not in Treaſon. And if it were a Challenge in Treaſon, where the Tryal is in a County at large, yet not where it is in a City and County, and if in a City and County, yet not in *London*.

The aſſigning many Reaſons for one and the ſame thing, makes the Judgment juſtly ſuſpected, for if when two Wit-

neſſes to one Fact varying in the Circumſtances of it, are juſtly ſuſpected in point of Truth, ſeveral Reaſons for the ſame Judgment makes the Knowledge or Integrity of the Judges juſtly ſuſpected; every Caſe in Law, as my Lords *Coke* and *Hales* ſay, ſtanding upon its own particular Reaſon, and therefore when many Reaſons are given, it looks as if the Judges were hunting about for Reaſons to make good what beforehand they are reſolved to vent for Law, rather than that their Judgment is the Reſult of thoſe Reaſons.

But to conſider them ſingly, I do indeed think there is no expreſs Reſolution, that at Common Law, in any Caſe of any Capital Matter, it was a good Challenge (except the Caſe of *Fitz-Harris*, already taken notice of) but in Civil Matters, my Lord *Coke* is expreſs, that at Common Law it was a good Challenge; and with him Sir *John Forteſcue* ſeems to concur, in his Expoſition on the Statute of *Henry* the *5th*. he ſays, if the Debts or Damages were under forty Marks, the Jury-man ſhall have Land to a competent Value, according to the Diſcretion of the Juſtices. My Lord *Coke* ſaith, in ſuch caſe any Free-hold ſufficeth, now how can that be true, if it were not neceſſary at Common Law, to have ſome Free-hold, for the Statute makes no Proviſion for Debt or Damages under forty Marks. It muſt therefore be by Common Law, that ſome Free-hold was neceſſary, and that any Free-hold ſhall ſuffice. And ſurely, if in Civil Matters it was neceſſary for a Juror to have a Free-hold, much more in capital Matters, and moſtly in Treaſon. It is very plain, that at Common Law no man was thought to be a ſufficient man, but a Free-holder, and though now, and for ſome time paſt, the Value of Trade is equal to that of Land, yet heretofore it was not ſo, and by what was heretofore, the Common Law is to be known.

The matter of Trade was heretofore ſo inconſiderable, and the Traders themſelves, for that reaſon ſo vile, that it was a Diſparagement for a Free-holder to marry with a Trades-man, as is to be ſeen by the Statute of *Wharton*, and therefore meer Trades-men, and not Free-holders, were not to be truſted with the Concern of a Tryal in a civil Matter, and much leſs in a Capital, and leaſt of all in a Tryal of High-Treaſon.

The Chief Juſtice *Pemberton* ſays, that the reaſon of Free-holders, was that no ſlight Perſons ſhould be put upon a Jury where the Life of a man, or his Eſtate is in queſtion; it is plain therefore, the Concern of the thing to be tryed, is the meaſure of the ſubſtance of the Jury-man; if that be true, the Tryal in Treaſon is of the higheſt concern: How then is it true, as ſome of the Judges concluded, that though Free hold might be requiſite in ſome Caſes at Common Law, yet in Treaſon, certainly not? it is indeed a Paradox to me

And

And the peremptory Challenge of thirty five allowed the Priſoner, is no Reaſon againſt the Challenge of no Free-hold; for that is only a Priviledge allowed the Priſoner in *Favorem Vitæ*; and it might as well be argued, that no Challenge at all to the petty Jury ſhall be allowed the Priſoner, becauſe he had a Grand Jury paſt upon him before, which is alſo in *Favorem Vitæ*, that no man at the Kings Suit, ſhall be ſo much as queſtioned for his Life, till above the number of twelve ſubſtantial men, have, on their Oaths, ſaid they think the Accuſation true; and after that, he is allowed to challenge peremptorily thirty five, and with cauſe, without number; to affirm therefore that no Free-hold is not a cauſe of Challenge, becauſe he may challenge peremptorily thirty five, is a *non ſequitur*, and though Non-uſage, that is to ſay, that this Challenge was never taken in Treaſon, was then uſed as an Argument, yet it is the weakeſt of Arguments, which is to be found in *Littleton*, though even that Fact was not true, for the Challenge was taken and allowed before, unleſs you will diſtinguiſh and ſay, that in that caſe it was taken by the King, and therefore good, and in this by the Priſoner, and therefore bad; I'm ſure that Difference cannot be warranted, either by Authority or Reaſon; and what though *Cook* and the other Regicides and other Perſons did not take that Challenge, is it an Argument that they could not, or that they thought they could not? perhaps they had forgotten to do it, as much as the Judges in this caſe had forgotten their Reſolution in *Fitz-Harris*'s Caſe; or perhaps they could not take it, their Jury being Free-holders, or perhaps it was to no purpoſe, they being tryed in *Middleſex*, where a Jury of Free-holders would quickly be found. Nor is it an Argument that no Caſe of this Challenge at Common Law is to be found in the Books; for ſince the Statute of *Henry* the *5th.* to the time of Queen *Mary*, it could never be a Caſe, and from that time to this, it could never be a Caſe in Felony, and the Law being ſo very plain, that if the Fact were with the Priſoner, it was always allowed, if againſt the Priſoner, it was diſallowed, not as not good in point of Law, but as not true in point of Fact; therefore the Challenge perhaps was not taken notice of in the Books, which only reports Difficulties.

It is true of late, and it is but of late, Practice, the whole Tranſactions of a Tryal is publiſhed for the benefit of the Publiſher, rather than for the common Good, and that indeed was the Motive of publiſhing *Fitz-Harris*'s Tryal, ſigned by *Fra. Pemberton*, and of *Colledges*'s Tryal, ſigned by *Fra. North*, and of my Lord *Ruſſel*'s, ſigned by *William Prichard* Mayor, and Col. *Sidnie*'s *Tryal*, ſigned by *George Jefferies*, and *Mr. Carniſh*'s *Tryal*, ſigned by *Thomas Jones*. And that is the reaſon, why ſince that Statute we find no Caſe of ſuch a Challenge in capital Matters, and before that Statute, the Year-Books go but a little way.

It

It is enough that there was no Reſolution that it was not a good Challenge, for it will be of the Kings ſide, to ſhew why that ſhould not be a good Challenge in Treaſon, which was in moſt if not in all other Caſes.

It is pretty to obſerve what ſteps were made in over-ruling this Challenge, ſome were of Opinion that it was no Challenge in any Caſe at Common Law; ſo ſaid the Attorny and Sollicitor General, the Chief Baron, Juſtice *Windham*, and Baron *Street*. The Chief Juſtice thought it no Challenge at Common Law in Treaſon or Felony only, but that the Statute of *Henry* the *5th.* made it a Challenge in Treaſon and Felony; but whether the Statute of *Henry* the *5th.* made it a Challenge in Treaſon; the Chief Baron and Juſtice *Windham* doubted. Juſtice *Jones* thought it no Challenge at Common Law in Treaſon; Juſtice *Levins* would not determine whether it was a good Challenge in any Caſe at Common Law, but he and Baron *Street* were clearly of Opinion it was not a good Challenge in *London*. The Chief Juſtice thought it a Buſineſs of great conſequence, not only for the Priſoner, but for all other Perſons, Baron *Street* thought the Judges had been very nice in the Matter, which in the Phraſe of the Law, is giving themſelves a great deal of trouble in a matter very clear, or of no moment.

But though they differ'd in their Reaſons, yet all agreed in this, and in this only, that tryed he ſhould be, and that preſently.

Then, as for the Cuſtom of the City of *London*, to try without Free-holders, how did it appear to the Judges that there was any ſuch Cuſtom? Did they ever read of any ſuch Cuſtom in the City of *London*? Nay, were not the Statutes which were cited, where no Free-hold was made no Challenge in *London* in particular Caſes, as ſo many expreſs Reſolutions, that there was no ſuch Cuſtom in the City, for if there had been ſuch Cuſtom, what needed thoſe Statutes, to which the Judges never vouchſafed any Anſwer? becauſe in truth, they could make no Anſwer.

But it was objected, there was the Reſolution in the City of *Worceſters* Caſe, which I agree was of as good Authority, and of no better than the Judgment in the principal Matter of the *Quo Warranto*; and it was likewiſe objected, there would be a Failure of Juſtice in Cities, if the Challenge were good for want of Free-holders.

I ask, would it have been a Failure of Juſtice at Common Law, or by reaſon of ſomewhat which hath happened of late Times, there is none who pretends to know any thing of the Hiſtory of *England*, that will ſay, that heretofore the Cities were not inhabited moſtly by the Gentry, and eſpecially the City of *London*; partly for Luxury, partly for their Security, and then there was no want of Free-holders in the Cities; but when

matters

matters became more quiet, and Trade encreased, and made Houses in the Cities more valuable, then were Houses of equal Convenience, and less Price, scituate in the Suburbs, or in the Country, the Gentry by degrees parted with their Houses in the Cities to Trades-men for Profit, and removed themselves to other Places. And I believe it may be remembred, that even the *Strand*, in the memory Man, could have furnished the County of *Middlesex* with a sufficient Number of Free-holders, and yet now, for the above Reasons, you can hardly find a Jury of Free-holders there.

Besides, it must be remembred, that *London* heretofore had many of the Kings Palaces in it, and the Countries did not then as now, take up with Lodging, but were Inhabitants of Houses, and if the Failure of Justice happen by the above means, I am sure it is against the Oath of the Judges to supply that Defect with their Resolution; but it ought to have been supplied by an Act of the Legislative Power.

If the Necessity of the thing warrants the Judgment, how unlearned were the Judges in *Henry* the *7th.* and *Henry* the *8ths.* Times, that they did not supply the Defect in Law in the City of *London*, and other Cities by their Resolutions: How vain were the Parliaments in those Times, who supplied those Defects in Law, mentioned in the Acts cited by those Statutes, which were Works of time and trouble; if they had thought the Judges, by their Resolutions had Power to do it, for if they had Power to do it, they could have done it *Extempore*, as in this Case.

For the last Objection that the Writ mentions, only *Probos & Legales Homines*, and speaks nothing of Free-holders; *Legales* may very well be interpreted, to imply men qualified by Law; but I take it, that *Homines* implies, it for *Homines de Comitatu* is meant Free-holders of that County and all others, in point of Trust, are not considered in Law. My Lord *Coke* in his Comment upon the *28th.* of *Eliz. 1. cap.* 8. which gives the Election of Sheriffs to the People of the County, where the Sheriffwick is not in Fee, says, People there means Free-holders of the County, and the same is understood by Writs to the Countries to chuse *Coroners*, *Verderors* and the like, tho' the Writ says *per communitatem Comitatus, & de assensu Comitatus.*

And tho' the Writs of *Venire* in civil Matters, of late Days, mentions what Freehold each Juror shall have, yet that is by the Statute of the 35 of *Hen.* 8 *cap.* 6. which expressly commands the Writ shall so express it, in all Issues joyned in *Westminster*, to be tryed between Party and Party, before which time it is plain, the *Venire*, even in civil *Matters*, did not express any Freehold, and that Statute doth not extend to Issues joyned on Indictments.

Now if upon all which hath been ſaid, it is not plain, that the challenge ought to have been allowed, yet ſure it was doubtful, and if ſo, and a matter of great conſequence, as the *Chief Juſtice* ſaid it was, why might not the *Council* for the Priſoner have had a little more time to have conſidered of the *challenge*, before they had argued it, or the *Judges* have taken a little time to conſider the matter, before they had given their Judgment. I dare ſay, none of them could remember any poſitive Reſolutions one way or other, nor upon a ſudden was it expected they ſhould; and therefore for their own ſakes, if not for the Priſoners, they might have taken the *Morning*, if not the *Day*; the Priſoner deſired his Tryal to be put off, for to have conſider'd of it, in that time perhaps ſome of them might have remembred, or others might have put them in mind of their Reſolutions in *Fitz-Harris*'s Caſe, they might have conſidered how to diſtinguiſh between that Caſe and this, and not run away with it, that that challenge was never made in Treaſon, as all of the Judges affirmed; but my Lord *Ruſſel* was told by the *Court*, that they always tryed the Priſoner in Treaſon the day he was Arraigned, and could not put off the Tryal for a morning without the Attorney Generals Conſent; but ſurely that is not true, *Plunket* and *Fitz-Harris* were tryed the Term after they were arraigned, though the Attorney General oppoſed it. It is true, he ſubmitted to the Rule, as it was as much his Duty to do as the Priſoners; but if there be a Difference between an Arraignment at *Weſtminſter* and the *Old-Baily*, as to the ſpeeding the Tryal, the Place will not vary the reaſon of the thing, if there be not any Law for it, as there is not; but even at the *Old Baily*, the Tryal in Treaſon hath been put of to another Seſſions, it was done in *Whitebreads* Caſe, and in many other Caſes, if it be ſaid that that was by the Attorney Generals Conſent, I ſay that makes no difference, for the Judge is to be indifferent between the Attorney General and the Priſoner, if the Court muſt order nothing but what the Attorney aſſents too, why is not the Priſoner Tryed and Judged by the Attorney alone, or what needs all the Formality of a Tryal, if it be ſaid that that Tryal, was put of, becauſe the Kings Witneſſes were not ready, I ſay there is the ſame Reaſon to put of a Tryal, becauſe the Priſoners Witneſſes are not ready, and that was the pretended, tho not the true Reaſon of putting of *Fitz-Harris* his Tryal to another Term, and there is no Law to the contrary.

It is totally in the diſcretion of the Judges, to put of a Tryal, which diſcretion ought to be governed by Reaſon.

But indeed this was extraordinary and without any preſident, it can never be ſhewn in the Caſe of the greateſt or meaneſt Perſons, being accuſed of the greateſt or leaſt Crime, that ever the delay of a day much leſs of a morning for his Tryal was denyed, where he ſhewed but any Colour for what he ſaid,

when

when the Seſſions were to continue after the time he deſired as in this Caſe it did. *Fitz-Harris* ſaid his Witneſſes were in *Holland*, and tho he named no Perſons, yet his Tryal was put off to the next Term; my Lord *Ruſſel* ſaid his Witneſſes could not be in Town till that Night, yet the reſpite till next day was denyed, all Perſons agreed, that there was ſome extraordinary Reaſon for it, and before the Tryal was over, the Riddle was out.

My Lord of *Eſſex* was killed, or to be killed, that Morning, as to this Matter it is not material, whether by his own or anothers Hand, they were ſenſible, the Evidence againſt my Lord *Ruſſel* was very defective, and that accident was to help it out, but that would not avail unleſs it were a ſurpriſing Matter upon the Jury, ſhould the Jury have had a days or but a Mornings time to conſider of it, People might have been talking with the Jury, it was very material to ask, what influence that accident would have on my Lord *Ruſſels* Trial, whether it was any Evidence againſt him, they might have been told what was true, that no Perſon killed, was in Law ſuppoſed to have killed himſelf, till a Coroners Enqueſt had ſate upon the view of his Body and found it ſo, and if it had been ſo found, yet even that had been no Evidence againſt another, becauſe the Coroners Enqueſt never found the reaſon why a Man killed himſelf, and if they ſhould find the reaſon, yet even that was no Evidence againſt another, becauſe that other was never called before the Coroners Enqueſt to make his defence, they might have been told a great many Circumſtances of the Improbability of the killing himſelf, they might have obſerved that the Kings Counſel was ſo far ſenſible, that it was no Evidence againſt my Lord *Ruſſel*, that they never attempted to prove the Earl of *Eſſex* was dead or killed himſelf, it was only ſlyly inſinuated together with the reaſon of it which had its Effect, if the report be true of ſome of the Jurymen's ſaying it went farther with them than all the Evidence of the Witneſſes produced, and if that be true, there was a reaſon, tho not a juſt one, for ſpeeding that Tryal beyond the ordinary Methods of Trials at the *Old Baily*.

But tho my Lord *Ruſſel* had ſeemingly leſs favour in that Matter than any other Perſon, even than *Colledge*, who had the reſpite of two or three hours between his Arraignment and Trial, (tho that was not in Favour to *Colledge*, but only to examine his Papers which they took from him, and inſtruct their Witneſſes accordingly) yet in other things he had more favour or juſtice done him; his *Papers* were not taken from him; it was agreed to be his Right to uſe them without queſtioning from whom he had them, what they were, or the like, as in *Colledge's* Caſe was done, he had a Copy of the Pannel of the *Jury*, even before his Arraignment given him, and the *Chief Juſtice* ſaid it was never

denyed

denyed in case of Life, that he knew of, which was denyed *Colledge* before he pleaded; because as then was pretended there was no Issue joyned; till *Plea pleaded*, after which the *Venire* is awarded, tho' all Men know, That the Sheriff summons the Jury before the Arraignment, and even after Issue joyned; *Colledge* was denyed a Copy of the Pannel, only he was told, he should look every Jury-man in the Face before he was Sworn; and as far as the Looks of a Man betrays him, he should be satisfyed, whether he was honest or not, which is an ill way of judging; for I think the Person, that gave that Rule, would have deceived any Man by his Countenance, who had known his Practices.

But says the *Attorney General*, in my Lord *Russel*'s Case, it was matter of Favour, and not of Right, therefore no Injustice to *Colledge*; I confess of all *Men*, which ever came to the Bar, he hath laid down the most Rules, which depend totally upon the Authority of his own Saying; In *Colledge*'s Case, he affirmed, that the King's Witnesses ought not to be kept out of the hearing of each other, when they gave their Evidence (a method used in Civil *Matters*, the reason of which is well known, and none can shew any Law or Reason, why it should not be used in capital *Matters*) with as much Reason and Authority as what now said.

First I do affirm there is no Authority in Law, which says a Prisoner shall not have a Copy of the Pannel; In the next place I do affirm, that after a Jury struck in a civil Matter, each Party ought to have a Copy of the Pannel, in order to provide himself of a challenge, if there be any cause: In the last Place, I do affirm, that by Law more Favour is allowed a Defendant in a Capital Matter to defend himself, then in a civil, and if these propositions be true, let any Person if he can make out the Law, or Reason of the above assertions.

Of a like stamp were the sayings, when my Lord desired a Copy of the Matter of Fact laid against him, the Attorney said he had notice of it, for questions were put to him about it, and he was with his Lordship himself, and examined him upon those questions, which was a Favour to him, that he might know what the Matter was he was accused of.

I do not affirm that ever it was practised, to give the Prisoner a Note of the Fact, to be given in Evidence against him, proving Treason, or that it was ever denied till then, nor do I know of any Law *pro* or *con* in the Case, but if one would judge by reason or practise in paralel Cases, I think it ought not to be denyed.

I know not at present of more than two Sorts of general Indictments, and those are of *Treason* and *Barretry*, the last is a general Indictment for stirring up Suits without reason, and without mentioning any Suit in particular; and therefore if by the

Rule

Rule of Court, the Defendant was not helpt, which obliges the Profecutor to give the Defendant ſome reaſonable time before the Tryal, a Note of what Suits he intends to give in Evidence againſt him; it was impoſſible for the Defendant to eſcape, if it had been his misfortune to have had five or ſix Suits.

For I never yet ſaw a Witneſs produced againſt the Indicted, but he would ſwear the indicted brought an Action againſt him without reaſon, and yet I have often ſeen, that the Indicted having had notice, that that was one of the Suits he was intended to be charged with, hath been able to prove, that he had good, or at leaſt, probable Cauſe of Suit, which he could not have done, if he had not notice; and in Treaſons for deſigning to kill the King, there having been ſo many Interpretations of Facts tending that way, that it is almoſt impoſſible for an Innocent to defend himſelf, unleſs he had notice of the Fact intended to be inſiſted on at the Tryal.

There are yet ſome expreſſions which mightily puzle me, the Kings Council ſaid in the argument of the challenge that they would not have the point of being a *Jury-man*, tho not a Free-holder loſt to the City of *London*, and one of the Judges ſaid, 'twas the Priviledges of the City were ſtruck at in that point, if by thoſe expreſſions it is meant, that it is for the benefit of the publick that there ſhould be no failure of Juſtice, I agree to it; but if it be meant that it is for the benefit of the Citizens to be *Jurymen*, I deny it; and I think nothing ſhews it plainer, than that it is a Priviledge, that a Citizen ſhall not be drawn out of the City to be a Jury-man, that a Nobleman ſhall not be on a Jury, that it is a Matter of Prerogative in the King and favour to a particular Perſon, to grant him a Charter of exemption from being on a Jury; ſo that if I conſider the Law, I know what is meant by thoſe expreſſions, if I conſider allowed Practice, it is true a Jury-man may earn his Eight Pence for a Tryal, but that is too inconſiderable pay, for Perſons of ſubſtance as the Jury-men in this caſe were ſaid to be fond of the employ, or to account it a Priviledge, but even that was but in civil Mattres, in criminal Matters, not Capital, the Jury were heretofore paid, if they acquitted the Defendant, but not if they found him Guilty; though of late it hath been Practiſed to give them more, and treat them higher if they Convicted the Defendant, than if they acquitted him; but in Capital Matters, as the Caſe in queſtion was, it was never allowed, or at leaſt owned to pay the Jury, be the Verdict which way it would, having ſpoken to the *Preliminaries*, I proceed to the Tryal, wherein Coll. *Rumſey* was firſt produced, he ſaid he was ſent by my Lord *Shaftsbury* about the end of *October*, or beginning of *November*, who told him, he ſhould meet at one *Sheppards*, the Duke of *Monmouth*, Lord *Ruſſel*, Lord *Gray*, Sir *Tho. Armſtrong* and Mr. *Ferguſon*, to know of them, what reſolution they were come to about the Riſing of *Taunton*; *Sheppard* carryed him where they were, and Anſwer was made, Mr. *Trenchard* had failed them, and there

would be no more done in the Matter, at that time; thereupon the Lord *Shaftsbury* took a Reſolution to be gone; Mr. *Ferguſon* ſpoke moſt of the Meſſage, and he thought the Lord *Gray* ſpoke ſomething to the ſame purpoſe, he did not know how often he had been at that Houſe, he was there more than once, or elſe he heard Mr. *Ferguſon* make a Report of another *Meeting* to the Lord *Shaftsbury*, my Lord *Ruſſel* was in the room, and that was all they ſaid at that time, that he remembred, he was not there above a quarter of an hour; there was ſome Diſcourſe about ſeeing in what poſture the *Guards* at the *Mews* and *Savoy* were in, by all the company; to know how to ſurpriſe them, if the Riſing had gone on; Sir *Tho. Armſtrong* and Mr. *Ferguſon* began all debated it, he thought the Duke of *Monmouth*, the Lord *Gray* and Sir *Tho. Armſtrong* were ſent to view them; the Riſing was appointed to be the 19*th.* of *November*, he was ſpoke to by the Lord *Shaftsbury* to go to *Briſtol*, if the Riſing had gon on, but in what quality was not determined; the Lord *Ruſſel* agreed to the Debate, being asked, if my Lord *Ruſſel* ſaid any thing there, and what? He anſwered, my Lord *Ruſſel* ſpoke about the Riſing at *Taunton*, being asked what my Lord *Ruſſel* ſaid, he anſwered my Lord *Ruſſel* diſcourſed of the Riſing; being asked if my Lord gave his Conſent to the Riſing, he ſaid he did. The next witneſs was Mr. *Sheppard*, who ſaid in *October* laſt, Mr. *Ferguſon* came to him in the Duke *Monmouth*'s Name, and deſired the Conveniency of his Houſe for himſelf and ſome Perſons of Quality, which he granted. In the Evening the Duke of *Monmouth*, Lord *Gray*, Lord *Ruſſel*, Sir *Thomas Armſtrong*, Coll. *Rumſey*, and Mr. *Ferguſon* came, not altogether, but the one after the other, Sir *Thomas Armſtrong* deſired, that none of his Servants might come up and that they might be private; ſo what they wanted he went down for, a Bottle of Wine or ſo, the ſubſtance of the diſcourſe was to ſurprize the Kings Guards, and in order to to it, the Duke of *Monmouth*, the Lord *Gray* and Sir *Thomas Armſtrong* went one Night, as he remembred, to the *Mewes*, or thereabouts, to ſee the *Guards*, and the next time they came to his Houſe, he heard Sir *Thomas Armſtrong* ſay, the Guards were very remiſs in their places, and not like Souldiers, and the thing was feaſible, if they had but ſtrength to do it, he remembred but two Meetings there, they came in the Evening, he heard, nor ſaw, any Coaches at his Door; when they came in, as he remembred, the Lord *Ruſſel*, was both times there, he had no buſineſs with the Lord *Ruſſel*, nor the Lord *Ruſſel* with him, at that time, but ſince he had; he did not remember Coll. *Rumſey* diſcourſt the Lord *Ruſſel* about any private buſineſs, nor remembred any farther Diſcourſe, he remembred no Writings nor Papers read at that time, upon Recollection he remembred one Paper read by *Mr. Ferguſon* in the nature of a *Declaration*, ſetting forth the Greivances of the Nation, the Particulars he could not tell: It was a pretty large Paper, it

was

was ſhewed for Approbation as he ſuppoſed, when to be ſet out was not diſcourſed, 'twas ſhewed to Sir *Thomas Armſtrong*, and as he remembred, the Duke of *Monmouth* was preſent, and he thought *Coll. Rumſey* was preſent. *Coll. Rumſey* ſaid he was not preſent, it was done before he came, Mr. *Sheppard* went on and ſaid the deſign of the Paper was in order to a riſing as he ſuppoſed, by the Purport of it, he would not ſay the Lord *Ruſſel* was there when that Paper was read, but he was there when the talk was about ſeiſing the Guards, he could not be poſitive as to the times of thoſe Meetings, but it was when the Lord *Shaftsbury* was abſent from his Houſe, he abſented about *Michaelmas* Day, he could not be poſitive that my Lord *Ruſſel* was at both Meetings, he thought he was at both, he was ſure he was at one, the laſt Witneſs was the Lord *Howard*, he ſaid, he brought Captain *Walcot* acquainted with the Lord *Shaftsbury*, and upon his account, Captain *Walcot* ſoon gained a confidence with the Lord *Shaftsbury*, *Walcot* told him, the People were ſenſible all their Intereſt was going to be loſt by the violence offered to the City, in the Election of Sheriffs, and that they were reſolved to take ſome Courſe to put a ſtop to it, that there was ſeveral meetings, about it, and ſome Perſons begun to prepare to Act, that ſome had good Horſes and kept them in private Stables, and he reſolved to be one in it, he having an Eſtate in *Ireland*, he diſpatch't his Son thither, and ordered his Son to turn his Stock into Mony, the Son went about *Auguſt*, that the 30*th* of *Sept. Walcot* Dined with him; told him that the Lord *Shaftsbury* was ſecreted and deſired to ſpeak with him, *Walcot* brought him to the Lord *Shaftsbury*, who complained of the Duke of *Monmouth* and the Lord *Ruſſel* for deſerting him, but there was ſuch preparation made in *London*, that now he was able to do it of himſelf, and intended to do it ſuddenly, he had above 10000 brisk Boys ready to follow him, when he held up his Finger, they would poſſeſs themſelves of the Gates, and in twenty four hours they would multiply to five times the number, and would be able to poſſeſs *Whitehall* by beating the Guards; the Lord *Howard* went to the Duke of *Monmouth*, told him the Lord *Shaftsbury*'s complaint, who ſaid, the Lord *Ruſſel* and he told the Lord *Shaftsbury* from the beginning, that there was nothing to be done by them in the Country, at that time; the Matter of the diſcourſe between him and the Duke of *Monmouth*, him and the Lord *Shaftsbury*, and him and *Walcot*, is too tedious to relate, and as little to the purpoſe, if the Jury had underſtood Matter of Law which they did not; in it he takes care to ſhew what Confidence my Lord *Shaftsbury* had in him, more than in the Duke of *Monmouth* or the Lord *Ruſſel*, how very Cautious he was, and how Precipitate the Lord *Shaftsbury* was, and that what he told the Duke of *Monmouth*, the Duke told the Lord *Ruſſel*, and he heard the Lord *Ruſſel* had been with the Lord

Shaftsbury,

Shaftsbury, and put off the intended rising, at which the Lord *Russel* interrupted him, and said he thought he had very hard measure, there was a great deal of Evidence given by hear-say only, whereupon the Chief Justice said it was nothing against the Prisoner, he declared it to the Jury, but the Attorney General bid the Lord *Howard* go on in the method of time, and that it was nothing against the Prisoner, but the Witness was coming to it, if his Lordship would have Patience, he assured him so, the Lord *Howard* went on where he left off, with a story between him and *Walcot*, of an intended Rising, and of some dark Sayings let fall by *Walcot*, and the Lord *Grey*, importing a Design upon the Kings Person, but the Lord *Howard* was very careful to put all off, but at last it was resolved to rise on the 17th of *November*, but the Lord *Howard* fearing it had been discovered, because he saw a Proclamation a little before, forbidding Bonefires without the Lord Mayors leave, that of the 17th of *November*, was also disappointed, and the Lord *Shaftsbury* went away and died, but considering they had gone so far, that it was not safe to retreat, and considering that so great an Affair as that was, consisting of such infinite Particulars, to be managed with so much fineness, they erected a Cabal of six Persons, the Duke of *Monmouth*, Lord of *Essex*, Lord *Russel*, Mr. *Hampden*, *Algernon Sidney*, and himself, about the middle of *January* last, and about that time, they met at *Mr. Hampdens* House, where it was considered whether the Insurrection should be in *London*, or in a Place distant, what Countries and Towns were fittest and most disposed to Action, what Arms necessary to be provided, how to raise twenty five, or thirty thousand Pounds, and how they might so order it, as to draw *Scotland* into a Consent with them; about ten days after, they met at the Lord *Russel's* House, and then resolved to send some Persons into *Scotland* to the Lord *Argile*, to invite some Persons hither to give an account of that Kingdom; the Persons to be invited, were Sir *Jo. Cockram*, Lord *Melvil*, Sir *Campbill*, that matter was referred to Col. *Sidney*, who told him he had sent *Aaron Smith*; they agreed not to meet again till the return of the Messenger; the Messenger was gone about a month, it was six weeks or more before he returned, and then his Lordship was forced to go into *Essex*, where he had a small Concern, where he staid three weeks, and when he returned, he was informed Sir *John Cockram* was come to Town, and afterwards he was forced to go to the *Bath*, where he spent five weeks, and from that time to this, was five weeks, all which time was a Parenthesis to him. And that he and the five mentioned erected themselves by mutual Agreement into that Society. *Atterbury* swore *Campbell* was in his Custody: then Col. *Rumsey* was asked whether my Lord *Russel* heard him when he delivered his Message to the Company, and in what place of the Room the Company were; who answered, that when he

came

came in, they were ſtanding by the Fire-ſide, but all came from thence to hear him; and when my Lord *Ruſſel* ſaid Col. *Rumſey* was there when he came in, *Rumſey* ſaid no, the Duke of *Monmouth* and Lord *Ruſſel* went away together.

Then in behalf of my Lord *Ruſſel*, the Earl of *Angleſey* was examined, who ſaid, that viſiting the Earl of *Bedford*, the Lord *Howard* came in, and told the Earl of *Bedford* that his Son could not be in ſuch a Plot, or ſuſpected of it, and that he knew nothing againſt the Lord *Ruſſel*, or any body elſe, of ſuch a Barbarous Deſign, and he was going on again with what the Lady *Chaworth* had told him, but was interrupted by the Kings Council, telling him, as the Court would not permit them to give Hear-ſay in Evidence againſt the Priſoner, ſo they muſt not permit his Lordſhip to give Hear-ſay in Evidence for the Priſoner. Mr. *Howard* ſaid, that the Lord *Howard* took it upon his Honour, and his Faith, he knew nothing of any Perſon concerned in that Buſineſs, and not only thought my *Lord Ruſſel* unjuſtly ſuffered, but he took God and Man to witneſs, he thought my Lord *Ruſſel* the worthieſt man in the World. Dr. *Burnet* ſaid, the Lord *Howard* was with him, and he did then, as he had done before, with Hands and Eyes lift up to Heaven, declare he knew nothing of any Plot, nor believed any, and treated it with great Scorn and Contempt. The Lord *Cavendiſh* teſtified, as to the Life and Converſation of the Lord *Ruſſel*, and thence concluded, it was not likely he ſhould be guilty of any ſuch matter, and heard the Lord *Ruſſel* ſpeak of *Rumſey*, as if he had an ill Opinion of him, and therefore it was not likely he ſhould truſt him. Dr. *Tillotſon* ſpoke of his Converſation. Dr. *Burnet* and Dr. *Cox* ſpoke of his Converſation, and of his Averſneſs to all Riſings. Dr. *Cox* teſtified, that my Lord *Ruſſel* ſaid the Lord *Howard* was a man of luxuriant Parts, but he had the luck not to be truſted by any Party. The Duke of *Somerſet* ſpoke of the Lord *Ruſſels* Converſation. The Lord *Clifford*, *Mr. Leveſon Gore*, *Mr. Spencer*, and Dr. *Fitz-Williams* ſpoke as to my Lord *Ruſſel's* Converſation. The Lord *Howard* being asked by the Jury what he ſaid to the Earl of *Angleſey's* Evidence, owned what the Earl ſaid, but he did it to out-face the matter, and if he ſaid untrue, he ought not to be believed on his Oath, and inſinuated, that he meant what he ſaid, to be meant of a Deſign of Murthering the King, which he did not believe the Duke of *Monmouth* or the Lord *Ruſſel* guilty of.

This being the ſum of the Evidence given againſt, or for, my Lord *Ruſſel*, let us conſider how far it will juſtify the Verdict given againſt him; firſt conſider the improbability of *Rumſey's* Evidence, if my Lord *Cavendiſh* ſaid true, that he ſhould truſt *Rumſey* to hear the debate about ſeizing the Guards, when the Lord *Ruſſel* had an ill Opinion of *Rumſey*, as for *Rumſey's* delivering the Meſſage, there was no great Matter in that, it is im-

poſſible to hinder Peoples ſpeaking, and it is not Treaſon to conceal what's ſaid; beſides it was well known, it was *Rumſey's* way to talk extravagantly, in order to accuſe thoſe that heard him, if they did not diſcover it, but beſides the improbability of the Evidence in reſpect of the Perſon, the manner of delivering the Evidence, and the Evidence it ſelf was ſuch as carryed no Colour of Truth with it, he ſaid he delivered his Meſſage and had an anſwer to it, and being asked what the Company ſaid further, anſwered, that was all that was ſaid at that time that he remembred, and gives a very good reaſon for it, for he ſtayed not above a quarter of an hour, and added that he was not certain, whether he then heard ſomething of a *Declaration* there, or whether Mr. *Ferguſon* reported it to my Lord *Shaftsbury*, that they had debated it, and yet when *Sheppard* ſaid *Rumſey* was there when the *Declaration* was read, he denyed it, and ſaid it was read before he came in, being asked to what the *Declaration* tended, he anſwered to another Matter, *viz.* that there was ſome diſcourſe about ſeeing in what Poſture the Guards were in, and ſaid that all the company debated it, and being drawn on by queſtions, ſaid it was in order to ſeize the Guards, if the Riſing had gone on; now how doth that Part of the Evidence agree with what he ſaid before, that there was nothing more ſaid then the delivering his Meſſage, and the anſwer to it; and how doth it agree with the time he ſaid he ſtaid, which was not above a quarter of an hour, whereas that debate, if all the Perſons preſent being ſix debated it, as he ſaid they did, it would certainly have taken up a larger time, how does the firſt and laſt part of his Evidence agree, when he ſaid my Lord *Ruſſel* agreed to the anſwer of his Meſſage, and being asked whether and what he ſpoke to it? ſaid, he ſpoke about the Riſing at *Taunton*, but doth not ſay, what, and yet in the firſt part of his Evidence, he ſaid when asked, who ſent the Meſſage back, Mr. *Ferguſon* delivered the anſwer, the Duke of *Monmouth* and the Lord *Ruſſel* were preſent, and he thought the Lord *Gray* ſaid ſomething to the ſame purpoſe, but what credit could be given to any part of a Mans Evidence, whoſe memory was ſo ſhallow, that he could not remember whether he was at two Meetings, or whether Mr. *Ferguſon* related one of them to the Lord *Shaftsbury*, yet both were ſuppoſed to be within the compaſs of a Year, whereas a Man of Sence is ſuppoſed to remember all his own Acts for ſeven Years paſt, which is the reaſon why the Chancery obliges a Man to anſwer as to his own Acts poſſitively for ſeven Years without ſaying as he believeth, or as he remembreth, or the like, what credit is to be given to a witneſs who teſtifieth what was ſaid in company, and by whom, when his memory doth not ſerve to anſwer poſſitively, whether he was in the company, or whether another told him what was there ſaid, he might as well have ſaid he was there, or dreamt he was there, or that he heard the diſcourſe or dreamt of it, had carryed equal credit with it.

It

It was plain, the Man was not of ſane memory enough to make a Will, much leſs to be a witneſs in the Tryal of a Man's Life, and nothing can be ſaid for him, but that he was a witneſs for the King, that is to ſay, a mad Man may be a witneſs to take away a Man's Life, which is as good Law as a great deal of other *Cant* vented as a part of the Prerogative.

It is true one of the Kings Counſel recommends *Rumſey* to the Jury, as a very credible witneſs under the notion of an unwilling witneſs, but had the ſame Perſon been a Councel for the Priſoner, he would have called *Rumſey* a dancing witneſs, for he ſaid backwards and forwards, and an amazed witneſs for being asked one thing, he anſwered another, being asked as to the *Declaration*, he anſwered to the ſeizing of the *Guards*, being asked whether my Lord *Ruſſel* aſſented to the anſwer of the Meſſage, he replied yes, becauſe he talked of the Riſing, *&c.* which might be as well againſt as for it.

Sheppard's Evidence was to the Deſign of ſeizing the *Guards*, and as to the *Declaration*, he remembred but two Meetings, at both which he ſaid, a he remembred, my Lord *Ruſſel* was preſent but he could not be poſitive in that, and the times of the *Meetings* he did not remember, he ſaid, the ſubſtance of the Diſcourſe was, how to ſurpriſe the Kings *Guards*, and that the Duke of *Monmouth*, the Lord *Gray* and Sir *Tho. Armſtrong* went to ſee the *Guards*, as he remembred, and the next time they came to the Houſe, Sir *Tho. Armſtrong* ſaid, the *Guards* were very remiſs, *&c.* Taking this *Evidence* by it ſelf, without tacking *Rumſey's* Evidence to it, it was ſo far from being *Evidence* of Treaſon, that it was no Crime; for he doth not ſay, it was intended to be put in practice, notwithſtanding all ſaid by him, both the Diſcourſes and the Perſons viewing the *Guards* (which laſt was not *Evidence*, not ought to have been given in *Evidence*) might be a *Matter* to try each others Judgments, as well as an *Evidence* of a thing deſigned, and if it be capable of two Interpretations, the Law hath ſaid, it ſhall be taken in *mitiore ſenſu*, in favour of *Life*, that diſtinction was taken by the Chief Juſtice in *Blagues* Caſe, the day after this Tryal where the Evidence againſt him, was a diſcourſe about taking the Tower, as High a Crime as ſeizing the Guards, and upon that *Blague* was acquitted, it is true *Rumſey* ſaid it was in order to be put in Practice, when the Riſing ſhould be in the Country, but that he did not ſay at firſt; but was afterwards lead to it by queſtions, nor doth he ſpeak it as a thing at that or at any other time determined, but as his own ſurmiſe or gueſs, becauſe he knew of an intended Riſing, yet how fooliſhly did he contradict himſelf, for ſays *Rumſey* it was to have been put in Practice, if the intended Riſing had gone on, and yet at the ſame Meeting he had ſaid before, the Riſing was put off, how contradictory therefore is it to ſay they made preparations for a thing they had laid aſide before, and it is plain *Sheppard*

ſpeaks

ſpeaks of the ſame time; for both agree, *Rumſey* was at that Meeting, tho they do not agree how ſoon he came; beſides, how could *Sheppard* ſpeak poſitively of the diſcourſes, or of the Deſign of it, when he owns he did not hear all their diſcourſe, and gives a very good reaſon for it; for he ſaid he went ſeveral times down to fetch Wine, Sugar and Nutmeg, and did not know what was ſaid in his abſence, he ſaid he heard nothing about a Riſing, nor heard any further diſcourſe; but on recollection, he heard ſomething about a Declaration of Grievances in order to a Riſing, as he ſuppoſed, the Particulars he could not tell, now what ſort of Evidence was that, in all Civil Matters, a Witneſs ſhall not be permitted to give Evidence of the content of a Deed or Writing without producing the Deed or Writing it ſelf, or a true Copy of it, and upon very good reaſon; for he may make an untrue Conſtruction of it, I remember a Witneſs who ſwore to the content of a Deed of Intail, and being asked whether he knew a Deed of Intail, and by what he knew the Deed he ſpoke of to be a Deed of Intail, anſwered he knew a tailed Deed very well, and he knew the Deed he ſpoke of to be a tailed Deed, becauſe it had a Tail half as long as his Arm, meaning the Label of the Deed, and if this be the Practice and the Reaſon of the Practice in Civil Matters, ſhew me any Authority or Reaſon any thing ſhould be permitted to be given in Evidence in Treaſon, which is not permitted to be given in Evidence in the Tryal of any Civil Matter.

If you ſay as Juſtice *Levins* ſaid, in a like Caſe, in *Colledge*'s Trial, that it would be the difficulteſt thing in the World to prove Treaſon againſt a Man, if the Law were not ſo, and the King would in no ſort be ſafe; of the other Hand I ſay as *Colledge* there ſaid, if the Law ſhould be ſo, no private Perſon is ſafe, and if there be miſchiefs of either Hand, the Law is and muſt be Judge, which hath taken care (tho to no purpoſe, becauſe it hath not been obſerved) that there ſhall be a ſtricter Proof in Treaſon than in any Civil Matter, or in any other Crime, and how the Judges come to permit that looſe Evidence in Treaſon to be given, which of late Years they have done, no juſt or honeſt Account can be given.

The laſt material Witneſs againſt my Lord *Ruſſel* was my Lord *Howard* (as for *Atterbury*'s Evidence, it ought not to have been permitted to be given, as ſhall be ſhewn, nor was it material) to no part of whoſe Evidence any Credit ought to be given, even by his own Confeſſion, he was ſurely in the right, when he ſaid that the Religion of an Oath is not tyed to a place, and I'le add, nor to a Form, but receives its Obligation from the Appeal is therein made to God, and therefore if he ſaid, (tho I own he was not bound to ſay it) to the Earl of *Bedford*, Mr. *Howard* and Dr. *Burnet*, what was teſtified againſt him, he ought not to be believed in any part of his Evidence, did he

ſay

ſay true to my Lord *Bedford*, when unſent for and unasked; for ought appears after my Lord *Ruſſel* was clapt into the Tower, he ſaid ſure his Son could never be in any ſuch Plot, as that, or ſuſpect for it, and that he knew nothing againſt him, or any body elſe, of ſuch a barbarous Deſign, and yet he knew if he ſwore true that my Lord *Ruſſel* was Guilty of ſuch a barbarous Deſign, that nothing but the Lord *Howard*'s Duty to God, the King and the Country, could prevail with him, to give it in Evidence againſt a Perſon for whom he had ſo great an Affection as he had for my Lord *Ruſſel*, how was it conſiſtent with the truth of his Evidence what he ſaid to Mr. *Howard*, that he knew nothing of any Mans being concerned in that buſineſs, and particularly of my Lord *Ruſſel* whom he highly Commended, and ſaid he thought the Lord *Ruſſel* unjuſtly Suffered, or with what he ſaid to Dr. *Burnet* with Hands and Eyes lift up to Heaven, which is as much an Appeal to God, as may be, that he knew nothing of any Plot, nor believed any, it was an idle Evaſion to ſay, when he ſpoke of my Lord *Ruſſel*, he meant my Lord *Ruſſel* was not Guilty of the Deſign of Murthering the King, (for which that Man as he ſaid was Committed) meaning *Walcot*, the Lord *Ruſſel*, or any other Perſon, for he is ſtill at liberty to explain himſelf, and I am apt to think they were all Committed by Warrants of the ſame Form. I know not how dextrous he is at paring an Apple, but he muſt be an Excellent *Logician* that can reconcile the truth of his Evidence and Sayings, the Truth is, that a Man that hath thoſe Niceties in his Head ought to have no Credit; for no Man knows whether he underſtands what he ſays aright, and I am apt to think that his Lordſhip can ſhew, that he did not intend what he ſaid at my Lord *Ruſſels* Tryal in the Sence it was underſtood by the Court or Jury, to ſay, that he was to outface the thing for himſelf and his Party was as vain (for beſides that I think he was of no Party, becauſe as my Lord *Ruſſel* ſaid he had the luck to be truſted by none) where was the Sence of making thoſe Proteſtations to Perſons, who could do him no good, and would do him no harm, both which my Lord *Pemberton* could; and therefore 'twas not alike: It is true the Attorney General Commends the Lord *Howard* as a Perſon of great Credit amongſt the Party, and inſinuates the Lord *Gray* was left out of the Cabal for his Immorality, and the Lord *Howard* was taken in his place; but to paſs from the General of his Evidence to the Particulars of it, for about two Leaves in the Print of it; it is a diſcourſe between my Lord *Shaftsbury* and *him*; wherein he makes my Lord *Shaftsbury* have a wondrous Confidence in him, and diſcovers all the Deſign to him, and what number of Men he had at Command; but who they were, or what they were, was never yet diſcovered, and yet the Lord *Howard* had not at that time been concerned in the Matter, nor did then aſſent,

he very prudently was resolved to see, whether it was likely to take Effect or not before he would enter on it, it was indeed a Matter of great wonder to those who knew my *Lord Shaftsbury*, and knew what Opinion he had of the *Lord Howard* from the time the *Lord Shaftsbury* discovered that the *Lord Howard* frequented the Dutchess of *Portsmouth*, which was before *Fitz-Harris* his Tryal, tho after that Tryal the Matter was publickly owned, which was before suspected by most known to the *Lord Shaftsbury*, that he should so readily trust the *Lord Howard* with the Secret, who was unconcerned in the management before, as he says himself, and yet secreted himself from the Duke of *Monmouth* and my *Lord Russel*, who were equally Guilty, if what was sworn, was true; I cannot but observe that in all the time of the Lord *Shaftsbury*, the *Lord Howard* was no otherwise concerned in the pretended Design, but in raising difficulties, and being in great fear least there should be a Rising or an Attempt upon the Kings Person, and if he said true, he was the Man that put of the intended Risings and likewise the intended Designs on the Kings Person, in so much that I think he was so far from standing in need of a Pardon for Treason, that he deserved a considerable Reward, if it were for nothing else than for his fearing the design was discover'd: By the *Proclamation* against Bonefires, which, as he said, put off the Rising intended to be the 17*th.* of *November*, and yet he and others being afraid the middle of *January*, they erected themselves into a Cabal of Six Persons, of which there is but one Person in all his Narrative, he pretends to have spoken to about that Matter before, which is the Duke of *Monmouth*, and but one more he pretends even by hearsay to be concerned in it before, which is my Lord *Russel*, and how improbable therefore was it, that those Six Persons should, as it were on sight, put themselves upon such a dangerous design, especially considering the reason he gives for it, which was their Fears, that what had been transacted was, or might be, discovered; this likewise is observable, that from the 30*th.* of *September*, the time the Sheriffs entred upon their Office to the 17*th.* of *November* following, he is very exact as to the time of each Matter, when there was no Person could contradict him; for my Lord *Shaftsbury* was dead, *Walcot* was convicted, and the Duke of *Monmouth* was gone, who are all the Persons mentioned to be concerned in that time, yet when he comes to speak of the matter, in which my Lord *Russel* was concerned, then he says, it was about the middle of *January*, about ten days after, about six weeks after, about three weeks and five weeks; for had he been precise in the times, he might have been disproved in the Meetings, he gave Evidence of; and it is much his Memory was so very good as to the former times to be so very precise in them as he was, and so very defective in the latter times, and yet those times do not make up the space between the middle

of

of *January*, and the time of the Tryal by many weeks, unleſs you will give large allowances to the word (about) an Exception which was taken to *Mowbray's* Evidence, tho' he rectifyed it by his account in his *Almanac*; but it would not be admitted, tho' *Colledge* very ſenſibly deſired of the Court for Juſtice ſake to look on the *Almanac*, to ſee whether it was newly writ, as if done for that purpoſe.

Beſides the Improbability, if ſuch a thing was in hand, as the Lord *Howard* pretended, for him to run into the Country, and then to the *Bath*, when the matter was juſt come to a *Criſis* as it were, ſhews him, if ſwore true, rather a Madman than a Traitor.

But the Uſage of the King's Council and the Court toward the Priſoner was very unjuſt and unfair, they permitted the Lord *Howard* to go on with a long ſtory of him and my Lord *Shaftsbury*, at which when my Lord *Ruſſel* took Exceptions, the *Chief Juſtice* it is true ſaid it was no Evidence, yet the *Attorney General* bidding him go on in the Method of time, he went on where he left of; intermixing Stories of Deſigns and of Attempts by other Perſons upon the Kings Perſon to exaſperate the Jury, as my Lord *Ruſſel* ſaid rightly againſt him; a thing which no Councel durſt have done, and no Court would have ſuffered in any other Caſe, nor even in that would the Court or Councel ſuffer it for the Priſoner; how was my Lord *Angleſey* checkt when he began to tell what my Lady *Chaworth* ſaid, and Mr. *Edward Howard*, when he did not ſpeak of his own knowledg, how unjuſt was it for the King's Council to repeat all the Evidence the Lord *Howard* gave, when they ſumm'd it up, even that which the Court told them before was not *Evidence*! how unjuſt was the inſinuating of the Death of my Lord of *Eſſex*, as Evidence againſt my Lord *Ruſſel*! and why did not the Court in Summing up the Evidence take notice of the Liberties the *Witneſſes* and *Council* had taken, and have told them what was not *Exidence*. No other reaſon can be given than what *Colledge* ſaid at his Tryal upon his Obſervation of *Fitz-Harris's* buſineſs and his own, That the Matter was not to ſtop at him.

REMARKS

ON

Col. Sidney's

TRYAL.

THE Lord *Ruſſel* being Executed, and the ſame day, what was called his Speech, being publiſhed then, which nothing of Print was more eagerly accepted or ſought after, which ſhewed the Inclination of People; there was ſome reſpite for quieting the minds of the People, but it was not to ſtop there, as *Colledge* ſaid, and therefore Col *Sidney* (who was talk'd to Death, under the Notion of a Common-wealths man) was the 17*th.* of *November*, 1683. brought to *Weſtminſter* to be arraigned on an Indictment of High-Treaſon; the Indictment at the time he came to the Hall, was ſo far from being found by the Grand Jury, that it was not ſo much as preſented to them; but the Kings Council, who had packt the Jury, knew well enough that it would be accepted, that is, found upon ſight by the Jury, without any conſideration, which was accordingly done, and Col. *Sidney* thereupon arraigned. The Indictment was for deſigning to depoſe the King, and to perſwade the Kings Subjects to rebel; and that he did write a certain Libel, wherein it was contained, that he (meaning King *Charles* the Second) is ſubject to the Law of God, as he is a Man, to the People who made him ſuch, as a King, *&c.* To which Indictment, he would have put in ſome Exceptions, expreſt in a Parchment in his Hand, but was told by the Court, he muſt either plead or demurr, and upon no other Terms Exceptions could, or ought to be, admitted, after which, he pleaded not Guilty.

The 21*th.* of *November* he was tryed, at which time he inſiſted to have a Copy of his Indictment, as he had done when he was arraigned; but was both times denyed. The firſt Witneſs againſt the Priſoner was Mr. *Weſt*, againſt whom Col. *Sidney* objected,

jected, becauſe he was not pardoned; but it was anſwered by the Court, that he was a good Witneſs in my Lord *Ruſſels* Tryal, and therefore ſhould be in that; then Col. *Sidney* deſired *Mr. Weſt* might ſpeak nothing but what he knew of Col. *Sidney*, but was anſwered by the Court, he might give Evidence of a Plot in general, though Col. *Sidney* not concerned in it, and it was called Sir *William Jones*'s Law; then *Mr. Weſt* went on, and gave Evidence of what Col. *Rumſey*, *Mr. Neltborp*, and *Mr. Ferguſon* told him of Col. *Sidney*, but of his own Knowledge, he could not ſay any thing of the Priſoner. *Rumſey* gave a like Evidence he had done in my Lord *Ruſſel's* Tryal, with an Addition of what *Mr. Weſt* and *Mr. Goodenough* told him. *Keeling* gave evidence of what *Goodenough* told him, all which the Court agreed was no Evidence againſt the Priſoner. Then the Lord *Howard* gave the like Evidence from the middle of *January* to that time, as he had done in the Lord *Ruſſel's* Tryal, ſaving that he ſaid the Earl of *Salisbury* was brought into the Cabal, who was not mentioned before, and ſave that he ſaid the meeting at my Lord *Ruſſel's* was about a Fortnight or three Weeks after the meeting at *Mr. Hampdens*; whereas in my Lord *Ruſſel's* Tryal, he ſays it was about ten days after the meeting at *Mr. Hampden'* Houſe, and here he makes two notable Speeches for *Mr. Hampden* at the opening of the Conſult, both which he had forgotten at my Lord *Ruſſel's* Tryal, nor could remember at *Mr. Hampden's* Tryal, though in the laſt he was lead by a great many Queſtions, to put him in mind of them. After his Evidence given, Col. *Sidney* was asked whether he would ask the Witneſs any Queſtions, who anſwered, he had no Queſtions to ask him; whereupon the Attorney General ſaid ſilence ——You know the Proverb.

The Record of the Lord *Ruſſel's* Conviction and Attainder was given in Evidence. Sir *Andrew Foſter* ſwore Sir *John Cockram* and the two *Campbells* came to *London*; Sir *Phillip Floyd* proved the ſeizing of ſome Papers in the Priſoners Houſe, and he did believe the Papers ſhewn in Court to be ſome of them. *Sheppard*, *Cary*, and *Cook* ſwore the Writing produced was like the Priſoners Hand-writing; the Attorney General deſired ſome part of the Writing ſhould be read; the Priſoner deſired all of it might be read, but was anſwered by the Court, that the Attorney muſt have what Part of it he would to be read, and afterwards the Priſoner ſhould have what Part of it he would, ſhould be read; but he perſiſted to deſire all of it ſhould be read; then the Writing was read, which was plainly an Anſwer to a Book, but what Book was not mentioned, in which the Right of the People was aſſerted. The Earl of *Angleſey* gave the ſame Evidence for the Priſoner, of the *Lord Howard's* ſpeaking of my *Lord Ruſſel* and the Plot, as he had done in my *Lord Ruſſel's* Tryal. The *Earl* of *Clare* ſaid that the *Lord Howard*, after Col. *Sidney's* Impriſonment, ſaid, if he was queſtioned again, he would

never plead, the quickeſt Diſpatch was the beſt, he was ſure they would have his Life, and ſpeaking of the Primate of *Armah*'s Perpheſie, ſaid, the Proſecution was begun, and he believed it would be very ſharp, but hoped it would be ſhort, and ſaid, he thought Col. *Sidney* as innocent as any man breathing, gave him great Encomiums, and bemoaned his Misfortune; and as for Col. *Sidney*'s Papers, he ſaid he was ſure they could make nothing of them. *Mr. Phillip Howard* ſaid, the Lord *Howard* ſaid it was a Sham-Plot; Dr. *Burnet* gave the ſame Evidence as he did in my Lord *Ruſſel*'s Tryal; *Mr. Ducas* gave Evidence, that the Lord *Howard* ſaid he knew nothing of Col. *Sidney*'s being in any Plot. The Lord *Paget* gave Evidence to the ſame purpoſe. *Mr. Edward Howard* gave Evidence to the ſame purpoſe. *Tracy* and *Penwick* gave Evidence to the ſame purpoſe. *Mr. Blake* teſtified, that the Lord *Howard* ſaid he had not his Pardon, and could not aſcribe it to any other reaſon, than that he muſt not have his Pardon, till the Drudgery of Swearing was over. Now to review what hath been ſaid, it is ſtrange to ſee what a Progreſs was made in the Reſolutions of Points of Law, to take away a mans Life; to ſay in Col. *Sidney*'s Words, as if the Court and Council thought it their Duty to take away a mans Life any how. *Mr. Weſt* and ſeveral others are admitted to give Evidence by Hear-ſay againſt the Priſoner, and their Evidence ſummed up and urged as Evidence to the Jury, and the Reaſon given for it, was, that he was admitted a good Witneſs of a like matter, in the Lord *Ruſſels* Tryal; which beſides that, it was not true, for he was rejected in that Tryal, as it appears in the Print; yet if he had been admitted, it was of no Authority, as Col. *Sidney* ſaid, becauſe perhaps he was not excepted to; of a like Stamp is the Evidence of the Conviction of the Lord *Ruſſel*, though I agree the Lord *Ruſſel*'s Conviction was as good Evidence againſt Col. *Sidney*, as the Earl of *Eſſex*'s Murther was againſt my Lord *Ruſſel*, and no better; the ſame may be ſaid of *Rumſey*, *Keeling*, *Foſter* and *Atterbury*'s Evidence. Againſt the Lord *Howard*'s Evidence, there was the ſame Objections, as in the Lord *Ruſſel*'s Tryal, with the Addition of ſeveral other Perſons, teſtifying, that he ſaid he knew not, or believed any thing of the matter, and that he could not have his Pardon, till he ſwore others out of their Lives, which in truth was the Senſe of his Expreſſions.

The Kings Council indeed had thought of ſomething ſince the Tryal of my *Lord Ruſſul* to palliate the matter of the *Lord Howard*'s Sayings (for they lean'd hard upon his Reputation, and lookt as if he would perjure himſelf at the expence of ſome Perſons Lives, as his Words are in the Lord *Ruſſels* Tryal) would you, ſay they, have had him confeſt the matter to thoſe Perſons to whom he had denyed it?

I think there is a difference between confeſſing and denying, who asked him the Queſtion? What did it avail him to deny it to the Perſons teſtifying againſt him? and therefore when he voluntarily ſaid a thing untrue, unasked, nor provoked or compelled to do it, and which could do him no good, it was good Evidence of his untruth, and that no Credit ought to be given to what he ſwore.

As for the laſt part of the Evidence, which was about the Writing, both the Indictment and the Evidence was defective.

As for the Evidence, if the Subject Matter of the Writing had been Evidence of Treaſon, the Indictment ought to have expreſt that he publiſhed it, which the Indictment in this Caſe did not; and upon good reaſon, which was, that the Jury might be put in mind, that the Publiſhing of it was neceſſary to make it known; whereas they very well knew that the Evidence would not, nor did come up to it. This was the firſt Indictment of High-Treaſon, upon which any man loſt his Life, for writing any thing without publiſhing it; for in *Fitz-Harris*'s Indictment, he was charged with publiſhing his Libel; and ſo in all other Indictments for Writing, and upon good reaſon, for this being made an overt Act of Treaſon, it muſt be an Evidence of a Deſign to kill or depoſe the King, or the like; and as the Conſequence of what in the Writing contained, which was that the Power was in the People, *&c.* being in its Nature no other, nor urged by the Kings Council, to any other intent than to corrupt the Subjects minds, could not be Evidence of ſuch matter, unleſs proved he had Writ and Pebliſhed it, whereof the laſt was not pretended to be proved.

That it was neceſſary to be expreſt in the Indictment, and and proved at the Tryal, appears by the Reſolution of all the Judges of *England* in *Hugh Pines* Caſe, reported in *Cro. Car.* 89. at a time when Prerogative run pretty high; wherein, beſides the reſolution that no Words charging the King with any perſonal Vice, is Treaſon. There is the Caſe of one *Peacham*, in the 33*d.* of *Henry* the 8*th*, cited, who was indicted for Treaſon, for Treaſonable Paſſages in a Sermon, never preached, nor intended to be preached, but found in Writing in his Study; he was found guilty, but never executed, for many Judges at that time were of Opinion it was not Treaſon, as the Book ſays, which I think, according to the Evidence here given, was the expreſs Caſe of Col. *Sidney*, admitting he writ the Book produced, and that the Paſſages in it were Treaſonable.

And as this Indictment was an Original in the particular before mentioned, ſo it was a ſecond of an *Innuendo* Indictment of Treaſon, *Fitz-Harris* was the firſt, the Proſecution againſt *Car*, as I remember, was an Information, and Judgment Arreſted after a Verdict becauſe it was by *innuendo*, of which no Precedent could

be

be produced, and although in Actions for words it was permitted, yet in Criminal Matters being Penal, it was reſolved it ought not to be permitted, and certainly much leſs in Treaſon, and as this Indictment was an Original in one part, and a Second in another, the Evidence on it was an Original in another part, which was proving the Book produced to be Coll. *Sydney's* Writing; becauſe the hand was like what ſome of the Witneſſes had ſeen him writ, an Evidence never permitted in a Criminal Matter before; The Caſe of the Lady *Carre* was truly cited by Coll. *Sydney* againſt whom there was an Indictment or Information of Perjury, in which it was reſolved that compariſion of hands was no Evidence in any Criminal Proſecution, and it muſt be owned that at that time beſides *Keeling* and *Twiſden*, there then ſate in that Court Sir *Wadham Windam*, whom all will own to have been the ſecond beſt Judge which ſate in *Weſtminſter-Hall*, ſince the Kings Reſturation, and if it be not Evidence in a Proſecution of Miſdemeanour, much leſs in Treaſon as Coll. *Sydney* ſaid, which inference, beſides the reaſon of the thing, is backt by the Authority of my Lord *Coke*.

But admitting Coll. *Sydney* writ that Book, and Publiſhed it; yet if it were not done with a deſign to ſtir the Subjects up into a Rebellion, but was writ and Publiſhed only *diſputandi gratia*, as the import of the Book ſhews plainly it was, it was no more Treaſon then the diſcourſe between *Blagrave* and Mate *Lee* about taking the Tower was, and ſuppoſe it was writ with that deſign, yet it not appearing when it was writ, how could a Jury upon their Oaths ſay it was done with a deſign to raiſe Rebellion againſt King *Charles* the *Second*, when for ought appeared, it was writ before he was King or thought of, it might for ought appeared be writ in Kings *Charles* the *Firſt* his time, or *Cromwells* time, and deſign'd againſt either of them, or any Foreign Prince, and therefore could not be Treaſon againſt King *Charles* the *Second*.

The Evidence was an Original in this Particular, alſo it was the firſt time that ever a Particular Expreſſion in a Writing was ever given in Evidence againſt a Man in Treaſon without reading the whole Writing, and for a very good reaſon given by the Jury in *Fitz Harris* his Caſe, which was that there might be ſomething in the Writing not expreſſed in the Indictment, which may explain the Clauſes in the Indictment, ſo that they may bear another conſtruction, and in that Tryal it was agreed, the whole Writing ought to be read, and was read accordingly, and it was the duty of the Court to have ordered it, whether the Priſoner or Jury had deſired it or not, as they are upon their Oaths to do right; but in Coll. *Sydney's* Caſe, when preſſed by him, it was denied; only ſome Particular Paſſages he might have read, if he would, which he did not accept of, upon a very good reaſon which he gave, which was, that he

knew

knew not the Paſſages of the Book, or at leaſt he did not remember them, and therefore could not call for them; 'tis true that Practice in Civil Matters is allowed to ſave time, where the miſchief is not very great, becauſe of a Paſſage in a Deed or Writing Material for either Party is omitted in reading, the Matter may be brought about again, but in Criminal much leſs in Capital, Proſecutions they cannot be, unleſs a way can be found to bring a Man to Life again.

Almoſt all the Circumſtances of this Tryal are Originals, the ſumming up of the Evidence againſt him was Barbarous, being Invectives, and no Conſequences, it was ſaid he was not only Guilty of the Practices he was accuſed of, but he could not have been otherwiſe, becauſe his Principles lead him to it, and it might with as good reaſon have been urged, that he not only was became, but was Born a Traitor; the laſt Matter remarkable in the Tryal was that of an Overt Act of which the Court ſaid it was reſolved by all the Judges of *England*, that if I buy a Knife of *J. S.* to kill the King and one Witneſs prove I bought a Knife, and another prove I bought it for that purpoſe, it is two witneſſes of an Overt Act within the Statute of *Ed. 6th.*

It were very fit to know who the Judges were which gave that reſolution, if it were but for the Authority of the Caſe; for I doubt the reaſon of it will convince no Man; they might as well have reſolved that eating or drinking, or the moſt ordinary Acts of a Mans Life, is an Overt Act of High Treaſon.

The Law hath taken that care for the Evidence of High Treaſon, which it hath not done in any other Caſe, that it muſt be proved by an Overt Act, proved by two witneſſes, one would think at firſt ſight of the Statute that there ſhould be two witneſſes to the ſame Fact; but that hath been adjudged otherwiſe, but ſtill it was reſolved, there muſt be two Witneſſes, but if this Reſolution be Law it is plain there needs but one, 'tis true if a Man does an Act for which he can give no reaſon, as Placing a Mine of Powder in a Place the King uſually paſſeth over, or planting a peice of Cannon to ſhoot at a place the King uſually paſſeth by, he cannot give a credible reaſon why he did it, and another ſwears the purpoſe of the thing, it is two good Witneſſes within the Act.

It hath been ſaid if a Man be bound to his good behaviour, and wears a Sword, it is a breach of the good behaviour, and perhaps heretofore when Swords were not uſually worn, but by Souldiers, it might be ſo; becauſe it ſtruck a Terror in other People as much as a Blunder-buſs, or the like unuſual Weapon, or the going Armed in a Coat of Mail for any Perſon, but a Souldier, doth at this day; but no Man will ſay that now Swords are uſually worn by all ſorts of People, that it is a breach of the good behaviour, and ſo that which heretofore was a Crime, by cuſtom now is become none.

It is therefore the unusualeness and the unaccountableness of the Circumstance makes it an Evidence which cannot be assigned as a reason in the Overt Act mentioned. The last thing I take Notice of is, that *Coll. Sydney* refused to ask the Lord *Howard* any questions, from whence was inferred, that he assented to the truth of the Matter sworn, but it is well known, 'tis no Prudence to ask a thorow paced Witness a question, in Mr. *Hampdens* Tryal, his Council refused so to do for that reason.

The next who fell a Sacrifice according to *Colledge's* Prophecy was *James Hallowey*, he was Out-lawed and taken beyond Sea, and being induced with promises of Life, to accuse himself of things (whether he was Guilty or not,) enough to make good an Indictment of High-Treason against him; It was indeed Generously offered him, that his Out-lawry should be set aside, and he should have the liberty to be Tryed, and defend himself as well as he could, but he knowing what since he was taken he had said, which would be brought in Evidence against him, refused his Tryal; and because he would not Purchase his Pardon, at the expence of Innocent Men's Blood by accusing others of what he did not know they were Guilty of, (if his dying Speech is to be believed,) he was executed.

I should not mentioned this, but for the sake of the next Persons Case which was Sir *Thomas Armstrong*, who was Out-lawed for High-Treason, when he was beyond Sea, he was taken and brought to the Kings-Bench-Bar.

REMARKS

Upon the

AWARD

OF

EXECUTION

AGAINST

Sir Tho. Armſtrong.

AT Common Law if a Perſon was beyond Sea, when an Out-lawry was pronounced againſt him, it was an Error in Fact, for which the Out-lawry was to be reverſed, and it is an Error in all Out-lawrys, but for High-Treaſon to this day by the *6th.* of *Edward* the *6th.* that Error is taken away in High-Treaſon, but there is a *Proviſo* in that Statute, that if the Perſon Out-lawed ſhall within a Year after the Out-lawry pronounced, yeild himſelf to the *Chief Juſtice* of the *Kings-Bench*, and offer to traverſe his Indictment, and on his Tryal ſhall be acquitted, he ſhall be diſcharged of the Out-lawry; upon the conſtruction of this Statute, no Judgment was ever given that I know of, and the reaſon is no Man Out-lawed was ever denyed a Tryal till this time, if he was taken within a competent Time, the reaſon of making that Statute was this; Men would commit Treaſon, and preſently fly beyond Sea, and ſtay there till the Witneſſes, who ſhould prove the Treaſon, were dead, then return and reverſe the Outlawry for the *Error* of their being beyond Sea, and the Witneſſes being dead, they were ſafe; and therefore this Statute takes away that Error in part, tho not in the whole, and doth in effect ſay, that the Perſon Outlawed ſhall not have advantage of that Error, unleſs he comes and takes his Tryal within a competent

time

time, which that Statute limits to be a Year after the Outlawry pronounced.

This being plainly the Sence of the Statute, it was injustice to deny the Favour or Right of a Tryal to Sir *Thomas Armstrong*, which vvas never denyed any Person before, nor since; vvhere it was agreed, that all the Witnesses against the Person accused vvas alive, as in Sir *Tho. Armstrong's* Case, they vvere barely upon the quibble of the Word *render*, vvhich in no Case that ever I read, vvas ever differenc'd from *taken*, but in one Case, vvhich is *Smith* and *Ashes* Case in *Cro. Car.* 42. In an Outlawry for Debt against Husband and Wife, vvhich vvill not extend to, or vvarrant the Judgment in this Case, and if there vvere but a doubt in the Case, as it cannot be denyed but there vvas, the Outlawry ought to have been vvaved, or at least Council for the Prisoner heard as to the Point.

It vvas a vain and unjust reason (and only tending to incense the thing) assigned by the *Attorney*, That the Prisoner vvas one vvho actually engaged to go upon the King's hasty coming to Town, to destroy him by the vvay, vvhenas the Prisoner offered to prove his innocence in that and other Matters, of vvhich he vvas accused, and even that object against him vvas an Invention of the Attorneys for any thing appears, but then it was resolved to suspect nothing, and Proces had made them fearless; *Fitz-Harris* and *Colledge* 'twas owned had hard measure, and that their Cases might be forgotten, their Quarters were hurryed, but Sir *Thomas Armstrong's* were exposed, tho the Proceedings against him were equally as unjustifiable, as in the other two Cases.

RE-

REMARKS
ON THE
TRYAL
OF
C. Conningſmark.

I Think fit to remember in the ſame Reign, tho before this time, one Caſe to ſhew how the Courts of Juſtice were remiſs, or violent, according to the ſubject Matter.

All will agree, that the Murther of Mr. *Thynne* was one of the moſt Barbarous and Impudent Murthers that ever was Committed, and of that Murther *Count Conningſmark*, tho he eſcaped Puniſhment, was the moſt Guilty.

I do not complain that in that Tryal, the Chief Juſtice directed the Priſoner, the way to make the Kings Councel ſhew the cauſe of Challenge againſt the Perſons, called on the Jury, and challenged for the King, without Reaſon it was his Duty ſo to do, and he ought to have directed *Fitz-Harris* the ſame Method, which he did not; but he was blameable that he did not ask the *Leiutenant* and *Polander*, what they had to ſay for themſelves, which was always done before, and ſince, that time, and ought to be asked of every Priſoner, which was an injuſtice; and therefore two of the Priſoners at the time of their Sentences, ſaid, they were never Tryed, tho I believe no great Injury to them, becauſe they had little or nothing to have ſaid for themſelves.

But if they had been askt, they would have ſaid as they did before their Tryals to the Juſtice of Peace, who Committed them, and as they did after their Condemnations, that *Count Conningſmark* put them upon doing what they did, which might have influenced the Jury to have found the *Count* Guilty, which was contrary to the Deſign of the Court, and it was for

the ſame Reaſon, the Chief Juſtice would not permit the Juſtice of Peace to read the Examination of *Sterne* and *Baroſky*.

I do agree that what they ſaid before the Juſtice of Peace was not Evidence againſt the *Count*, I do agree that the *Count* being Indicted and Tryed as Acceſſory at the ſame time the Principals were Indicted and Tryed, the Principals could not be good Witneſſes againſt the *Count*, becauſe properly a Principal ought to be Convicted before the Acceſſory be Tryed, and therefore tho for Expedition both are Tryed together, yet the Verdict always is, and ought to be, given againſt the Principal, before that of the Acceſſory.

But I deny what was in that Tryal laid down for Law, that the Acceſſory being in the ſame Indictment, with the Principal, muſt be Tryed at the ſame time, it is true the *Count* deſired his Tryal might be put of for two or three days, which the Court knowing what was beſt for the *Count* denied, and not for the above pretended Reaſon; for an Indictment againſt many may be Joynt, and yet the Tryals may be ſeveral, the Truth is in ſuch Caſes, the Indictment is joynt and ſeveral.

Suppoſe the Acceſſory, at the Tryals of the Principals, had not been in Cuſtody, will any Perſon ſay, that if afterwards he was taken, he cannot be Tryed upon that Indictment, in which he was joyned with the Principals.

But beſides an hundred Preſidents not Printed, there is *George Salisbury et al* the Caſe in *Plowden Fol.* 100. where it was reſolved, that tho an Indictment againſt many is Joynt, yet the *Venire* may be ſeveral againſt each Perſon, and conſequently the Tryals may be ſeveral, and if ſo then the times of the Tryals may be ſeveral, but that which is to be complained of is, that the *Count* in the Opinion of all Mankind at that time and ſince was the moſt guilty Man, yet the care taken to puniſh the leſs Guilty, as *Sterne* and *Boroſky*, was in order to let the moſt guilty eſcape; for I think both *Sterne* and *Boroſky* might have been, and would have been, good Witneſſes againſt the *Count*, if the Court would have permitted it, the *Count* might have been Indicted as Acceſſory to *Wratts* only, for the Acceſſory to all the Principals is Acceſſory to every of them ſeverally, and when the Court in their private Conſciences were ſatisfyed, the *Count* was moſt Guilty, they ought to have been cunning *aſtati*, as my Lord *Hobart* calls it, to have brought him to Puniſhment, but twas ſaid *Sterne* and *Boroſky*, being Indicted of the ſame Crime with the *Count*, they could not be good Witneſſes againſt him, which I think is no more Law than it is Truth, Truth it was not, for the *Count* was Indicted as Acceſſory, the reſt as Principals, but taking it that all was Indicted and Tryed as Principals for the ſame Fact, at the ſame time, why is not the Evidence of the one good againſt the other.

other. First, I think there is no expreſs Reſolution for that point of Law, but a late Rule given at *Kingſton* Aſſizes, upon the Tryal of a Maid and one *Saterwaite*, for Burning of an Houſe, and therefore there is a liberty to examine, by Reaſon, how the Law is. I agree, if a Man is indicted and tryed for killing another, he ſhall not be admitted to ſay, *B.* did it by himſelf, but I think he may be a good Witneſs to prove that he and *B.* did it, that is to ſay, he ſhall not give any *Evidence* againſt another, which tends to acquit himſelf, as well as accuſe another; but I think he may give *Evidence* which accuſes another of the ſame Crime whereof he is indicted, if it doth not tend to acquit himſelf.

For it is agreed of all hands, that being guilty of the ſame Crime, doth not diſable a Witneſs, for then *Widdrington* and ſeveral Perſons in the Lord *Ruſſel*'s Plot, as it was called, had not been good Witneſſes; in the next place, the Circumſtances of an Indictment againſt the Witneſſes, for the ſame thing he teſtifies againſt another, doth not diſable him; *Widdrington* was indicted for the ſame things, of which he gave *Evidence* againſt ſeveral others, as his Complices in Robberies; nay, the Law hath given ſomewhat more Credit to the *Evidence* of a Perſon indicted, as a Witneſs of the ſame things againſt others, than it does to a Perſon not indicted, as in the Caſe of an Approver, which as *Stamford* ſays, was a Perſon in Priſon (not at large) for the Fact for which he was indicted, arraigned upon an Indictment, or an Appeal of Felony, which before a Coroner aſſigned by the Court, confeſſes himſelf guilty of the Felony, of which he is indicted, and not of any other, and confeſſes other Perſons, naming them as Co-adjutors with him, in committing the Crime of which he is indicted, and not of any other Crime, ſo much Credit ſhall be given to that Confeſſion, that Proceſs ſhall be made out againſt the Perſon peached, who, if taken, ſhall be arraigned on that Approvement, as if an Indictment by a Grand Jury had been found againſt him, and if the Law gives ſo much Credit to an Approver, I think no Perſon can ſhew me a Reaſon, why a Perſon indicted is not a good Witneſs againſt another for the ſame Crime.

It

It is true, *Stamford* says, if the King gives an Approver a Pardon, he is a good Witneſs; which implies, that otherwiſe he is not; but it muſt be conſidered, that the reaſon of that, is, that an Approver being indicted, as he always is, and confeſſing the Indictment, is convicted, and a Perſon convicted of Felony, cannot be a Witneſs till pardoned; but it will be no Argument why *Sterne* or *Borosky* had not been good Witneſſes againſt the *Count*, before they were convicted; and it was a like piece of Juſtice, that whereas the *Count* was the moſt guilty, he was acquitted. *Wratz* being the next greateſt Offender, was honorably interred, and *Sterne* and the *Polander*, which were the leaſt Offenders in that Matter, were hanged in Chains.

It was ſomewhat like the *New-England* Law, remembred by *Hudibras*, of hanging an uſeleſs innocent *Weaver*, for an uſeful guilty *Cobler*.

RE-

REMARKS

ON

Mr. Corniſh's

TRYAL.

THere yet remains two Perſons Proſecutions to ſpeak of, the one was Mr. *Corniſh*, who was taken the —— of *October* 1685. and was arraigned on an Indictment of High-Treaſon the *Monday* after, for conſpiring to kill the late King *Charles* the Second, and knowing *James* Duke of *Monmouth*, *William Ruſſel Eſq*; and Sir *Thomas Armſtrong* to be Rebels and Traitors, promiſed to be aſſiſting to them in their Treaſons; to which he pleaded not Guilty; he deſired to put off his Tryal, becauſe he had no notice till the *Saturday* before at twelve a Clock, and he could get no Friend to come to him till eight a Clock at Night, and then he was permitted to ſpeak with no body, but in the preſence of the Goaler; he had been allowed no Pen, Ink, or Paper; he was told by the Court he ought not to have it, without Leave given on a Petition preferred by him, and that he was taken *Teuſday* before, which to that time was almoſt a Week; he ſaid his Children had petitioned the King the Night before to put off his Tryal, and it was referred to the Judges, he did not know whether he was committed for High-Treaſon againſt the then preſent, or the former King, and he had a material Witneſs an hundred and forty Miles off, but was told by the Court, they had no Power to put off his Tryal; it is true, they ſaid the Lord *Ruſſel*'s Tryal was put off to the Afternoon, (which was not true) but that was a Favour, which could not be challenged by another perſon as a Right; he complained he had not a Copy of the Pannel, but was anſwered it was not his Right to have it; then the Attorney ſaid he had not deſerved ſo well of the Government, as to have his Tryal delayed, and therefore he was preſently tryed.

Rumsey swore, that about the latter end of *October*, or beginning of *November*, the *Earl* of *Shaftsbury* desired him to go to Mr. *Sheppard*'s House, where was a Meeting of the Duke of *Monmouth*, Lord *Russel*, Lord *Gray*, Sir *Thomas Armstrong*, *Mr. Ferguson*, and *Mr. Sheppard*; he came late, and they were just on going away; he delivered his Message, and they told him that *Mr. Trenchard* had disappointed them; he had not been there above a quarter of an hour, but *Mr. Sheppard* was called down, and brought up *Mr. Corniſh*, and told them *Mr. Corniſh* was come, who came into the Room, and excused his not coming sooner, and that he could not stay, for he was to meet about the Charter, whereupon *Mr. Ferguson* opened his Bosom, and under his Stomacher pulled out a Paper, they told *Mr. Corniſh* they had had it read, and desired to read it to him; *Mr. Ferguson* read it, *Mr. Sheppard* held the Candle while it was reading, and afterwards they asked *Mr. Corniſh* how he liked it, who said, he liked it very well, he remembred two Points in it very well; the one was for Liberty of Conscience, the other was, that all who would assist in that Insurrection, which had Church or Kings-Lands in the late War, should have them restored to them; he did not hear all the Paper, and observed only these two Points, it was a Declaration on a Rising, and when the Rising was to have been, it was to have been dispersed abroad; there was a Rising intended at that time, and *Mr. Corniſh* said, he lik'd the Declaration, and what poor Interest he had he would joyn with it; he had great Dealings with *Mr. Corniſh*, and *Mr. Corniſh* was a very honest Man, it was out of compassion he had not accused *Mr. Corniſh* before.

Mr. Goodenough said there was a Design to rise in *London*, and for that purpose to divide the City into twenty parts, and to raise five hundred Men out of each part, to take the *Tower*, and to drive the *Guards* out of Town; before that agreed on, he being by chance at *Mr. Corniſh*'s House, said, the Law will not defend us; some other way was to be thought on; *Mr. Corniſh* said, he wondred the City was so unready, and the Country so ready; *Mr. Goodenough* replyed, there is something thought of to be done here, but in the first place, the *Tower* must be seized, where the Magazine is; *Mr. Corniſh* paused a little, and said, I will do what good I can, or what I can, or to that purpose, he said.

He afterwards met *Mr. Corniſh* on the *Exchange*, who asked him how Affairs went, and this was in *Easter Term* 1683. He had some Matters with *Mr. Corniſh* about managing the Riot, which was brought against him, *Mr. Corniſh*, and others, he came to *Mr. Corniſh*'s House about the Business of the Riot, and no Person was by at the Discourse; *Mr. Goſfright* testified for *Mr. Corniſh*, that he opposed *Mr. Goodenough*'s being Under-Sheriff, and said he would not trust an Hair of his Head with him, he was an ill *Man*, obnoxious to the Government, and had done ill

things,

things, and he would not truſt his Eſtate and Reputation in the Hands of ſuch an Under-Sheriff, and he believed *Mr. Goodenough* and *Mr. Corniſh* were never reconciled, *Mr. Love*, *Mr. Jekil* and Sir *William Turner* teſtified to the ſame purpoſe; *Mr. Lane* ſpoke out of the Printed Tryal, of my Lord *Ruſſel*, and ſaid *Rumſey* in that Tryal ſaid he did not hear the Declaration read; for it was read before he came, Dr. *Calamy* ſaid *Mr. Corniſh* did often come to Church and receive the Sacrament, *Mr. Sheppard* ſaid he was *Subpena'd* by the King, and by *Mr. Corniſh* the Night before, and that *Mr. Corniſh* his Son was with him the Afternoon of the day before, who preſt him to be at the Tryal the next day, that there were Accounts depending between him and Mr. *Corniſh*, whereon there was about one or two hundred Pounds due to Mr. *Corniſh*, and Mr. *Corniſh*'s *Subpena* was ſerved firſt upon him: At one of thoſe Meetings at his Houſe, Mr. *Corniſh* came to ſpeak a few words with the Duke of *Monmouth* or ſome other, he could not be poſitive in that, it was ſo many Years ago, he did not ſtay above half a quarter of an hour in the Houſe, *Sheppard* came up Stairs and went out with Mr. *Corniſh*, and there was not one word read, nor no Paper ſeen while Mr. *Corniſh* was there, he remembred there was a Declaration read, *Ferguſon* pulled it out of his Sho, he could not tell whether Mr. *Corniſh* was at his Houſe the Night the Declaration was read, but he was poſitive no Paper was read while Mr. *Corniſh* was there, for Mr. *Corniſh* was not look'd on to be one of the Company, he did not know who Mr. *Corniſh* came to ſpeak with, when he came to *Sheppard*'s Houſe, Mr. *Corniſh* was but once at his Houſe when the Duke of *Monmouth* was there, he did not remember that Mr. *Corniſh* was in the Company when *Rumſey* was there, he ſaid he had attended the Court from Eleven a Clock till half an hour paſt three.

This being the Sum of the Evidence, given in the Tryal for, and againſt, the Priſoner. Let us ſee whether thoſe Inferences could be made from it, as was made by the Court and Counſel, and whether on the whole, an honeſt Jury, tho but of little underſtanding, could have found him Guilty of the Treaſon in the Indictment.

It is agreed of all Hands, that a petty Jury may, and muſt, conſider the credibility of a Witneſs, (tho in the Lord *Shaftsbury*'s Caſe, it was ſaid a *Grand Jury* ought not ſo to do) and if ſo ſurely *Rumſey* was not a credible, tho he was not a diſabled, Witneſs, no more than a Man, who owns himſelf to be a Man of Falſhood, a profligate Wretch, and perjured by his own Confeſſion, tho not Convicted of it; he had notoriouſly confeſſed himſelf Guilty of High-Treaſon, and of being in the Deſign of an intended barbarous Murther, he had ſworn in the Lord *Ruſſel*'s Tryal, he had named all the Perſons at the Meeting, he ſpoke of, of which Mr. *Corniſh* was none, and being taxt in this Tryal

with

with it, he excuſes his Perjury with Compaſſion to the Priſoner, which was mean, fooliſh and contradictory; he Perjured himſelf to ſave the Priſoner, and then ſwore Truth to Hang him, he had not preſence of mind enough to excuſe himſelf in the manner, a Witneſs in the Lord *Ruſſel's* Tryal, did, that his God, his King and his Countrey, put him unwillingly to Act that Part, beſides that in the Lord *Ruſſel's* Tryal, *Rumſey* ſwore he was not at the reading the Declaration, and contradicted *Sheppard*, who ſwore he thought he was there.

But that paſſage was proved only by a Witneſs, who had read it in the Tryal, which I confeſs in ſtrictneſs of Law is not Evidence, for if the Witneſs had ſaid he heard *Rumſey* ſwear ſo at the Lord *Ruſſels* Tryal, even that had not been Evidence, unleſs a Record of that Tryal had been produced in Court, which was not done; but all thoſe things being but meer circumſtances, ſhew the injuſtice of Speeding his Tryal, and denying him Councel: Would not any Councel have told him that in ſtrictneſs of Law, a Paſſage in a Printed Tryal was not Evidence, and was it not eaſie for him to have got a Witneſs to have ſaid that he had heard *Rumſey* ſwear ſo at that Tryal, were not all the Judges which ſate upon him, and all the Kings Councel which were againſt him, preſent at the Lord *Ruſſels* Tryal, and perfectly remembred what *Rumſey* then ſwore, as to the Pretended Declaration, and might he not have *Subpœna'd* them to have teſtifyed that Matter? Nay, was it not their Duty, to have done it even without a *Subpœna.*?

To ſay it was againſt the King, and therefore they could not do it, or they were in the Commiſſion to try him, and therefore they could not do it, is neither Law nor Reaſon, every Man knows that a Judge in a Civil Matter Tryed before him, and a Councel even againſt his Client hath been enforc't to give Evidence (provided it be not of a Secret communicated to him, by his Client) for in that particular, a Judge ceaſes to be a Judge, and is a Witneſs; of whoſe Evidence the Jury are the Judges, tho he after re-aſſume his Authority, and is afterwards a Judge of the Juries Verdict.

A Judge may Sue, and muſt be Sued, in his Court, but in that Caſe he ceaſes to be a Judge and is a Suitor, though he re-aſſumes his Authority in all other matters, and if it be ſo in Civil matters, let any Man ſhew me a reaſon why the Law is not ſo in Criminal matters, there is no expreſs Law againſt it, and it will be abſurd in reaſon to ſay the Law is not ſo; for at that rate the King may put any witneſs, he knows the Priſoner intends to produce for himſelf, into the Commiſſion for Trying him, and ſo deprive the Priſoner of the benefit of his Evidence as in this Caſe; *Sheppard* whoſe Evidence ought to have been of great, (as it ſhall be ſhewn,) tho it was not of any, Avail to the Priſoner, might have been put into the Commiſſion,

to

to have Tryed Mr. *Corniſh*, for he was as much qualified for it, as Sir *James Smith* then Lord *Mayor*, or any Judge upon the *Bench*, and if they might have been witneſſes for the Priſoner, if *Subpœna'd*, they might have been witneſſes for him, even without asking; and it was a duty incumbent on them, though not as Judges yet as Chriſtian Men ſo to be.

Humanity commands the Diſcovery of Truths, which prevent the ſhedding Innocent Blood, and Chriſtianity commands a Man to do as he would be done by. I think the queſtion need not be asked what they would have had done, if it had been their Caſe.

The reaſon that all matters of Law are, or ought to be, Tranſacted publickly, is, that any Perſon unconcerned as well as concerned, may as *amicus curiæ*, inform the Court better, if he thinks they are in an error, that Juſtice may be done, and the reaſon that all Tryals are publick, is, that any Perſon may inform in point of Fact, though not *Subpœna'd*, that Truth may be diſcovered in Civil as well as Criminal matters.

There is an invitation to all Perſon, who can inform the Court, concerning the matter to be tryed to come into Court, and they ſhall be heard. It is true if the Judges or any Perſon had teſtifyed what *Rumſey* had ſaid at my Lord *Ruſſel's* Tryal, it had not been Evidence without the record of the Tryal, and it is as true that neither the Record, nor a true Copy of it could have been procured between *Mr. Corniſh's* Commitment, if it were on *Friday*, (as I have heard it was) though the Court ſaid, it was on *Tueſday*, much leſs between the notice of his Tryal, which was *Saturday-noon*, and the time of his Tryal, which was *Monday-morning*.

But then what Juſtice was there in ſpeeding his Tryal, ſo as to deprive him of the Circumſtances of his defence, for that was but a Circumſtance, and not an eſſential matter, and what account can be given why the Court when they were well ſatisfied, that it was in the Priſoners Power to procure ſuch a witneſs, and ſuch a record, did not ſtay till he did it; or if it would be too long in doing why ſhould they not have put off the Tryal for that time, and give the Priſoner a convenient time to do it.

The firſt, in Civil matters hath been, frequently done, when a Deed or Witneſs hath been wanting, if it could be done in a convenient time, and the putting off a Tryal before it came on, though after it came on they have not done it, becauſe there is no great miſcheif in that, for either Party hath Power to bring it about again, but not ſo in Capital matters, and therefore Jurys in Capital matters have been frequently diſcharged, after ſworn, where the Evidence hath been defective.

It is true my Lord *Coke* ſaith that a Jury once charged with a Priſoner, cannot be diſcharged but muſt give their Verdict, but

it is as true that he ſays ſo in Favour of the Priſoner, that when the Evidence againſt him appears defective, he ſhall not be continued a Priſoner till more Evidence can be found, or procured againſt him, though the Practice of late days hath been quite contrary, *viz.* to diſcharge the Jury where the Evidence againſt the Priſoner hath been defective, but enforce them to give a Verdict, where the Priſoner's defence hath been defective, though to their knowledge if he had longer time to do it, he had been able to produce the witneſſes who could clear him, but by what Law or reaſon I am to ſeek, yet I confeſs, if *Rumſey*'s owning his Perjury in the Lord *Ruſſels* Tryal, in the very point ſworn againſt the Priſoner, and ſo friveloully excuſing it would not diſcredit him; I know not that any Record, Witneſs, or Evidence would have availed *Mr. Corniſh.*

And add to *Rumſey*'s contradicting himſelf, that *Sheppard*, who never contradicted himſelf, and had been a witneſs in both Tryals agrees, that what *Rumſey* had ſworn in my Lord *Ruſſels* Tryal, as to *Mr. Corniſh*'s not being there, was true.

But admitting *Rumſey* had never perjured himſelf but was of equal credit with *Sheppard*, yet when they contradicted each other in a point, which carryed no probability or improbability with it in a Capital matter, the Jury ought to believe in *favorem vitæ*; for it makes the matter at leaſt doubtful, and therefore the Jury ought to have acquitted the Priſoner, for a reaſon the Law, and which was given in Coll. *Sydneys* Tryal (tho ſhewiſhly) by the Court, *viz.* that it is better that 20 Nocents ſhould eſcape than one Innocent ſufferer.

But to paſs from the credibility of the witneſs to the matter of his Evidence, this was the ſecond time that this ſort of Evidence in any Caſe Criminal or Civil, was permitted to be given in Evidence, and there is the ſame exceptions to it, as are above aſſigned to the Evidence of *Sheppard*, as to the *Declaration* in my Lord *Ruſſel's* Tryal, if a true Copy of part of a Deed or Writing was never yet permitted to be given in Evidence, much leſs hath or ought the purport of part of a writing be given in Evidence, eſpecially when ſuch a reaſon is given, why the vvitneſs remembred but part of it, as is given by *Sheppard* in my Lord *Ruſſel's* Tryal, and *Rumſey* in this Tryal, they did not hear all the Paper read.

And ſurely *Goodenough* could no way fortifie *Rumſey's* Evidence, being clearly of another matter, and that ſo very uncertain that no heed ought to have been given to it, when *Goodenough* told *Mr. Corniſh* ſomething ought to be done in the City, but in the firſt place the Tower ought to be ſeized, to which he anſvvered he would do what he could, or vvhat good he could, may as vvell relate to *Goodenoughs* precedent diſcourſe, vvhere he complains, that the Law vvould not defend them, though Innocent as vvell as to the ſeizing the Tovv er, and if they ſhould

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refer to the laſt, yet they may well enough be interpreted, that he vvould do what he could, or what good he could, to prevent the ſeizing the Tower, and if they are capable of two Senſes they ought to be interpreted in the beſt for the Priſoner.

Beſides the words are ſpoken not as a thing deſigned, but as a matter vvithout vvhich all other matters vvere in vain, and might be meer matter of diſcourſe, as was that between *Blague* and Mate *Lee* about taking the *Tower*, and if there was ſuch a Deſign a Foot, it doth not appear, that Mr. *Corniſh* was ever acquainted with it; the ſame may be ſaid as to what he asked *Goodenough*, when he asked how Matters went. may not thoſe words well enough be applied to the buſineſs of the Riot, *Goodenough* managed for *Mr. Corniſh* and others, and if what *Goodenough* ſaid was Evidence of a Deſign of Seizing the *Tower*, that as well as the Treaſon againſt the Guards were Treaſons by the Act of the late King, and not by the 25*th* of *Edward* the *Third*, if it be true Doctrine, which was laid down in the Charge to the Earl of *Shaftsbur*'s Grand Jury, and if ſo, it ought to have been Proſecuted for it, within ſix Months, and Indicted within three Months if the Doctrine in *Colledge*'s Tryal be true, and yet this Deſign, if true, was in *Eaſter* Term 1683. and the Proſecution not till *October* 1685.

There was yet one peice of Evidence urged againſt him, that by his own Witneſs, *Sheppard*, who poſitively teſtified for him as to the main, yet in a Circumſtance ſeemed to teſtifie againſt him, which was Mr. *Corniſh*'s being at his Houſe, when the Duke of *Monmouth*, and the reſt were there, when the Declaration was read, and upon that peice of Evidence, as if it had contradicted what Mr. *Corniſh* ſaid before, there was mighty Triumph, whereas the moſt that could have been made of it was that M. *Corniſh* in part of his defence was Guilty of an Untruth, and even that was not ſo in Fact; for being charged to have been at *Sheppard's* the Night the Declaration was read, he anſwered he was never at a Conſult in his Life, he never vvas at *Sheppard*'s in any Conſult, he never vvas there vvith my Lord *Ruſſel*, as he remembred; he had been at *Sheppard*'s ſeveral times, but never liked *Ferguſon* for his *Morals*, and therefore never liked to be in his company, and he did not knovv, but that he might enquire for the Duke of *Monmouth* in other Places, and this is all *Mr. Corniſh* ſays of that matter.

Sheppard ſays, Mr. *Corniſh* came into his Houſe at one of the Meetings to ſpeak with the Duke of *Monmouth* or ſome other, he could not be poſitive in that, it was ſo many Years ago, and did not ſtay half a quarter of an hour, he could not ſay it was the night the *Declaration* was read; he did not know, whether Mr. *Corniſh* came to ſpeak with the Duke of *Monmouth* or not; he could not remember, whether Mr. *Corniſh* was there in company,

pany, when *Rumsey* was there; there were not above three Persons there when Mr. *Corniſh* came, which was the Duke of *Monmouth*, *Mr. Ferguſon*, and he could not tell, whether the other was the Lord *Ruſſel*, or the Lord *Gray*.

Now it would be hard to find out the contradiction between *Mr Corniſh*'s Sayings and *Sheppard*'s Evidence; both agree that *Mr. Corniſh* hath been often at *Sheppard's* Houſe, and neither denies or affirms that he was, or was not there the Night the Declaration was read, for a good Reaſon, which was that *Mr. Corniſh* knew nothing of it, and *Sheppard* knew not which of the Nights he was there, *Mr. Corniſh* ſaid he was not there with my Lord *Ruſſel*, as he remembred, and *Sheppard* doth not affirm he was there with the Lord *Ruſſel*; *Sheppard* ſays he was there, when the Duke of *Monmouth* was there, and *Mr. Corniſh* doth not ſay, that he was not there with the Duke of *Monmouth*, *Sheppard* ſaid, he ſpoke to the Duke of *Monmouth*, or ſome other Perſon, but he thought it was the Duke of *Monmouth*, which is no direct Affirmation that he ſpoke to the Duke; and *Mr. Corniſh* doth not ſay, he did not ſpeak to the Duke of *Monmouth*; ſo that if the Account of the Tryal, ſet out by the Authority of, and ſigned by, *Tho: Jones* be true, I cannot ſee any manner of contradiction between *Mr. Corniſh* and *Sheppard*: And therefore, as the Court and the King's Council did infer, that *Sheppard's* Evidence, who poſitively denyes the Truth of *Rumſey's* Evidence, was ſo far from invalidating, that it corroborated *Rumſey's* Evidence, and cleared the thing, which was before ſomewhat dark, beyond all manner of contradiction, is a piece of effrontery: but admitting *Sheppard* had ſaid *Mr. Corniſh* was at his houſe the night the *Declaration* was read, and had contradicted *Mr. Corniſh*, is it a neceſſary conſequence, that he heard the *Declaration* read, and promiſed his aſſiſtance to it? which muſt be the inference, if it muſt ſupport *Rumſey's* Evidence.

If it be not a neceſſary Conſequent, but a probable one, that ought not to weigh with a Jury, to convict a Perſon of a capital Crime, eſpecially not of Treaſon, the Statute of *Edw.* the 3*d.* ſays probably Convict, that is ſays my Lord *Coke*, convicted upon direct and manifeſt Proof, not upon probable Conjectural Preſumptions, or Inferences, or Strains of Wit: And to ſay truth, when Verdicts have been given on ſuch Evidence, they have been often faulty.

To give ſome Inſtances of many, it is remembred in our time, where Perſons were convicted of the Murther of a Perſon abſent, but not dead, barely by Inferences upon the Evidence of fooliſh Words and Actions; but the Judge before whom it was tryed, was ſo unſatisfied in the Matter, becauſe the Body of the Perſon ſuppoſed to be murthered was not to be found, that he reprieved the Perſons condemned, yet in a Circuit afterwards, a certain unwary Judge, without inquiring into the Reaſons of the Reprieve, ordered

ordered Execution, and the Persons to be hanged in Chains, which was done accordingly, and afterwards, to his Reprach, the Persons supposed to be murthered appeared alive.

My Lord *Coke* relates a like Story in his Time, of an Uncle, who beat his Neice which had an Estate, which on her Death would descend to him, the Girl was heard to cry, good Uncle do not kill me, after which she ran away, and concealed her self some few miles from *London*; the Girl being missing, and the Neighbours remembring the Cry of the Girl, and tacking it to the Probability that the Uncle might be induced, for his Advantage, to murther his Neice, apprehends him, and he was indicted for it at the Sessions, and the Judges being unsatisfied in the Evidence, by reason the Body of the supposed murthered Girl did not appear; the Uncle saying that she was run away, they gave him time to the next Sessions to find her out, which he being not able to do, thought to defend himself by producing another Girl very like his own Neice, which he did accordingly; and being detected, it increased the Suspition, and by Inferences from all those Circumstances, he was convicted, and afterwards executed.

Some years after which, the Girl appeared, and claimed her Estate, and therefore it is a most dangerous and unwarrantable thing, for a Jury, in capital Matters, especially in Treason, to convict a Person upon the Evidence of Probabilities.

As the Evidence in this Case against the Prisoner was weaker than in any of the precedent Cases, so the Usage of the Prisoner was more rigorous than in any of them; in all the other Cases, the Prisoners had more Weeks allowed them to prepare for their Tryals, than this Person had Days; all the other Persons, after Notice of Tryal, were permitted to have Friends, nay, Council, freely to come to them, and confer with them in private, without the Presence of a Goaler, which was denied this Person; all the others, except Col. *Sidney*, had soft Words given them on their Tryals; but this Person was rudely handled.

How often was he snubb'd and bid hold his Tongue? How often did he beg the Patience of the Court, to hear him and his Witnesses? and when he was heard, how was all he said ridicul'd? and if he said he was innocent, he was bid remember my Lord *Russel* said so to his Death, when he said he was as innocent as any Person in the Court, he was told, for all his Confidence few believed him. If he said the Matter sworn against him was improbable (which hath been taken for a pretty good Topick for the Dis-belief of a Matter testified) how is it ridicul'd by *Improbability*, *Improbability*, *Improbability*? If he go to prove he is an honest Man, he is told that is all Appearance. If he says he employed *Goodenough* about the Riot, he is told that is a Branch of the Plot. If he call Mr. *Gospright* as a Witness for him, the Witness

is reproached with having helpt the Priſoner in packing Juries; if he call one to prove he received the Sacrament, he is told, that was in order to qualifie himſelf to be a Sheriff, and as ſuch his Uſage before, and at the Tryal, ſuch was it afterwards, to order him to be tyed when he was ſenten'ed, was an Indignity not uſed to Perſons of his Quality, a thing indeed permitted, not commanded to be uſed, on boiſtrous Criminals, who may be ſuſpected to do a ſudden Miſchief, if their Arms were at liberty.

Of like kind was the Reproaching him with the Chearfulneſs of his Countenance at his Condemnation, and that it might be all of a Strain, his Quarters were expoſed, a Severity us'd to none abovementioned, but Sir *Thomas Armſtrong*, and in all theſe Tryals, *Colledge* made the beſt Defence, and perhaps Circumſtances conſidered, the beſt Defence ever made upon an Indictment of a Capital Matter, and *Mr. Corniſh*'s was the weakeſt, though it ſignified nothing; for I believe that none who reads his Tryal, but will plainly ſee he was ſo beſet, that the Defence he, or any for him could make, would have availed him nothing, and no Account can be given for the Proceedings againſt *Mr. Corniſh*, in the above manner, but that ſome of the Judges, whereof three of them were then on the Bench, had been newly come out of the *Weſt*, where they had been ſo fluſhe and hardned, that nothing ſeemed to them Rigorous or Cruel, and the reſt ſeemed to vie with them in the Practice.

RE-

REMARKS

ON

Mr. Bateman's

TRYAL.

THE laſt Perſon, which concluded the Tragedy, was one *Charles Bateman* a Chyrurgeon, his demerits were, that he had been, or at leaſt was repured to have been Chyrurgeon to the Earl of *Shaftsbury*, and one whom his Lordſhip had a kindneſs for, and therefore according to the Cant of the Time, he was called a Factious Fellow; and he had reviv'd the Memory of his demerits, by attending when *Oates* came from his Whipping, and Letting him Blood; whether either of thoſe Circumſtances were true or not, I know not, but they were believed: And therefore the 9th of *December* 1685. he was Indicted and Try'd for High Treaſon. On his Tryal he ſeemed to be Diſtracted, and therefore out of abundance of Charity, the Court appointed his Son to make his Defence for him.

The Witneſſes againſt him were *Keeling*, who only ſpoke of a Deſign in general, without mentioning *Bateman* to be concern'd in it, *Thomas Lee* and *Richard Goodenough* ſwore, at ſeveral times and places his diſcourſe to them ſeverally, of ſeiſing the *Tower*, *City* and *Savoy*. *Baker* for the Priſoner ſaid, *Lee* in the Year 1683. would have had him inſinuated himſelf into the Priſoners company, and diſcourſe about State affairs, and by that he would find a way to make *Baker* a great Man: upon the Evidence the Priſoner was found guilty. Againſt

Goodenough's

Goodenough's Evidence, there is only this to be ſaid, that he was pardon'd but ſo far only, as to qualifie him to be a Witneſs, though not a very credible one, not only the Guilt ſticking to him, but even the Puniſhment of what he had then lately done, hanging over his head, and what was ſaid for ſome time, of all the Witneſſes for the King, at that time, and for ſome time before, was true, they hunted like Cormorants with Halters about their Necks, though even that matter by one of the Kings Councel was boaſted to the Jury, as a circumſtance of more credibility; for he aſſured them there was not a Witneſs which he produced had a Pardon, as the Witneſſes in the Popiſh Plot had. 'Tis true, in the Popiſh Plot, upon very good reaſon the Witneſſes having confeſſed what they pretented to know, of matters in which they had an hand, it was not thought proper to uſe them as Witneſſes, though they had uſed them as Informers, till they were pardon'd, leaſt it might happen to be, or at leaſt it would have been ſuſpected, that the terror of the Puniſhment of the Crimes confeſs'd might influence them to ſwear falſly to the jeopardy of other Mens Lives, to ſave their own, which as the Lord *Howard* truly ſaid, was the drudgery of Swearing. But to *Lee*'s Evidence, beſides the Evidence of *Baker* againſt him, that he would have procured *Baker* to have been a Witneſs againſt the Priſoner, and enticed him with the promiſe of making him a great Man, and beſides that it appears in *Rouſe* his Tryal, that *Rouſe* and he were upon the Trepan with each other, to bring each other into the pretence of a Plot, in order to make ſome advantageous diſcovery of it, of which *Lee* got the ſtart of *Rouſe*; the objection which was made to his Evidence, why *Lee* had not accuſed the Priſoner ſooner, there being near three Years between the pretended deſign, and the diſcovery of it, was never ſatisfactorily anſwered, it was a fooliſh ſtory to ſay *Goodenough* could not be had before, and a ſingle Teſtimony in High-Treaſon was not ſufficient; every one knows, that though a ſingle Witneſs is not enough to convict a Man of High-Treaſon, yet a ſingle Perſons Teſtimony is enough to commit a Perſon accuſed, and upon Conviction on the Teſtimony of a ſingle witneſs, to make him a Priſoner for his life, witneſs Mr. *Hampden* and others, beſides the ſubjecting him to other Corporal puniſhments, inflicted at diſcretion, witneſs Mr. *Johnſon* and *Oates*; and in 1683. when the words were pretended to be ſpoken *Bateman* had not been ſpared if accuſed; and though it be a good reaſon for the Court to have given, why they did not proceed againſt the Priſoner till that time, becauſe there were not two Witneſſes againſt him, yet it was no reaſon for *Lee*, why he did not accuſe the Priſoner before that time, eſpecially he having been ſeveral times before that time examined, not only of what he knew, but of what Perſons he knew concerned: but to ſay truth, *Lee* in the Tryal did not

pretend

retend to anſwer the Objection, but the Court in the manner efore endeavoured to anſwer it for him.

The laſt Matter obſervable in this Tryal, was the permitting *Bateman*'s Son to make his Fathers Defence, which was an extraordinary unparaleli'd favour, it was the firſt and laſt time that, or any hing like it, had been done, the Lord *Ruſſel*'s Lady indeed was ermitted to take Notes at the Tryal for her Lord; but he only was permitted to make uſe of them; *Fitz-Harris* his Wife when ſhe but whiſpered her Husband, or but told him what jurors he ſhould challenge, and what not, was ſeverely corrected nd threatned to be thruſt out of Court, for doing it in prejudice f the King. In *Colledge's* Tryal, he was told that Perſons that dviſed a Priſoner in Treaſon, even before a Tryal, were guilty f High Miſdemeanor; nay a Solicitor had been Indicted of High-Treaſon for it, and therefore nothing can excuſe the allowing the Priſoner Council in matter of Fact, as was done n this Caſe (it is not material, whether the Son was a Bariſter t Law or not) but the weakneſs of the Priſoner, who to all appearance was moped Mad.

But the Court by excuſing their Favour upon that account incurred a worſe cenſure; for nothing is more certain in Law, than that a Perſon who falls Mad after a Crime ſuppoſed to be committed, ſhall not be tryed for it; and if he fall Mad after Judgment, he ſhall not be executed, though I do not think the reaſon given for the Law in that point will maintain it, which is that the end of Puniſhment is the ſtriking a Terror into others, but the Execution of a Mad-man had not that effect; which is not true, for the Terror to the living is equal, whether the Perſon be Mad or in his Senſes, and that is the reaſon of breaking the Perſon executed for Treaſon, and expoſing his Quarters, which is done rather to deterr the living, than for puniſhing the dead; but the true reaſon of the Law, I think to be this, a Perſon of *non ſana Memoria*, and a Lunatick during his Lunacy, is by an Act of God (for ſo it is called, though the means may be humane, be it violent, as hard impriſonment, Terror of death, or natural, as ſickneſs) diſabled to make his juſt defence, there may be circumſtances lying in his private knowledge, which would prove his innocency, of which he can have no advantage, becauſe not known to the Perſons, who ſhall take upon them his Defence, and that is the reaſon many Civil actions die with the Perſons againſt whom they lay in their Life times, and that is the reaſon why in Criminal matters, Perſons by ordinary courſe of Law, cannot be convicted after their deaths.

For in all civil Actions, there is as much reaſon for the Perſon injured, to have ſatisfaction out of the Eſtate of the Perſon who injured him, in the hands of his Heir or Executor after his death, as there was to have it out of the Eſtate of the Injurer in his own hands in his Life time, and there is as much reaſon that the Heir or Executor of a Perſon who hath committed a Crime, which by Law would have forfeited his Eſtate, if in his Life time he had been attainted of the ſame, ſhould forfeit the Eſtates they claim from him, as if he had been attainted in his Life time, which had prevented the ſaid Eſtates veſting in them, and it hath been ſometimes practiſed, where the Crimes of the Perſons deceaſed have been notorious, and without any doubt, as was the Caſe of ſeveral Perſons mentioned in the Act of Pains and Penalties, which Act had example from many other Acts of Parliament in other Reigns, where the Perſons were dead before Puniſhment overtook them.

And though of late years it hath been pretended, that the Kings ſafety depends upon the ſpeedy Tryal and Execution of a Perſon guilty of High-Treaſon, yet that was never thought ſo heretofore, nor in Truth in it ſelf is ſo; for it is plain in reaſon as well as experience, that what is ſaid of Witches is true, of all Malefactors when once they are in Cuſtody, their power of doing miſchief ceaſes.

The King is therefore no otherwiſe benefited by the deſtruction of his Subjects than that his Example deters others from committing the like Crimes, and there being ſo many to be made Examples of, beſides thoſe on whom the misfortunes of Madneſs falls, it is inconſiſtent with humanity to make Examples of them; it is inconſiſtent with Religion, as being againſt Chriſtian charity, to ſend a great Offender quick, as it is ſtiled, into another World, when he is not of a capacity to fit himſelf for it; but what ever the Reaſon of the Law is, it is plain, the Law is ſo, and for remedying it in High-Treaſon, was the 33 of *Henry the Eighth* made, whereby is is Enacted, that if a Man fall Mad after he hath committed High-Treaſon, he ſhall notwithſtanding be tryed in his abſcence, and if a Man fall Mad after he is attainted of High-Treaſon, he ſhall notwithſtanding be Executed, which Statute extending only to High-Treaſon, the Law continued, and yet is as it was at Common-Law in all other Capital Matters, and even that Statute was called a Cruel and Inhuman Law, and therefore lived not long, for it was afterwards Repealed, ſo that the Law as to this matter, when this man was try'd and executed, was as it was at Common-Law, and therefore if he was of *non ſana Memoria*, he ought not to have been tryed, much leſs executed. I know

it

it will be objected, that if this matter of *non sana Memoria* should be permitted, to put off a Tryal or stay Execution, all Malefactors will pretend to be so, but I say there is a great deal of difference between pretences and realities, and *sana* and *non sana Memoria*, hath been often tryed in Capital Matters, and the Prisoners have reaped so little benefit by their pretences, it being always discovered, that we rarely hear of it, in this Case the Prisoner might have been tryed as well absent as present, according to that repealed Statute, for any advantage he did, or could, reap by being present, and it seems very probable the Court thought him distempered, for if he was of sane memory, his Son ought not to have been permitted to make his Fathers defence; if he was distempered, he ought not to have been try'd, much less executed, and this Person being the last man, as far as I can remember, or can find by the Printed Tryals, which suffered for the Plot of High-Treason first set on foot by *Fitz-Harris*, and carried on against *Colledge*, and the other Persons herein mentioned, and the Design stopping here, I think fit to end the Remarks in the Proceedings of all Capital Matters with him, but I think it is fit for me to make some Apology for the thing, and for my self, for taking on me to censure the Opinions and Actions of Persons whose Characters carried Authority with them, I confess I never thought that either the great Seal or a Garment ever added to a Man's Sence, Learning or Honesty; but he remained just such as to those qualities, after his preferment, as he was before, and as to many of the Persons reflected on in these Remarks, the censure of Coll. *Sydney* was true, and for the best of them, it is plain they not only varyed from one another in their Opinions, but even from themselves in the Judgment of the same Case, but always tending to the destruction of the Person tryed for his Life, witness the Opinion of the Court in the Challenge of Jurors not having a Free-hold, and the designing to levy War not Treason, within the *Stat.* of *Ed.* 3. and forty other Matters, and that not only gives a Liberty to enquire, but naturally puts one upon the Enquiry, which of the two Opinions is right, tho it is impossible for one, not to think meanly on the Person, who in so great a Concern, as a Man's Life, should be so rash as to give his Opinion without consideration, or so unsteady as to give different Opinions in the same Case; for if the Truth of a Man, who tells history backward and forward, is justly suspected in point of Truth, so the knowledge and sincerity of a Man, who gives different Opinions in the same Case, is justly suspected in point of Law, which together with the fulsom, but injurious, Stuff vented for Crown-Law, which was the first Matter, which put me on considering and writing what I have done.

And

And for my self, if *Tully* thought it a reproach to his Son, if he did not abound with Philosophy, having heard *Cratippus* for the space of a whole Year, and that at *Athens*, surely one who hath had his Education at one of the Three great Schools for some Years, and afterwards at the University: And lastly, Twenty five Years constant residence in an *Inns* of *Court*, and Twenty Years Attendance at *Westminster-Hall*, and not diverted by the usual Employs of a *Sollicitor* or *Attorney*, may be allowed without the Imputation of Confidence, to give his *Censure*, upon consideration, on the *extempore* Judgments or Opinions of *Persons*, tho' of greater Standing and Character than Himself.

FINIS